

THE
 FREEDOM
 OF
 SPEECH and WRITING
 UPON
 PUBLIC AFFAIRS,
 CONSIDERED;
 WITH
 AN HISTORICAL VIEW
 OF

The Roman Imperial Laws against Libels,
 as Violations of Majesty, or lesser Of-
 fences.

The Nature and Use of Torture among the
 Romans and modern Europeans.

The bringing of the Rack into the Tower,
 where it remains, for a beginning of the
 Civil Laws in England.

The different Treatment of Libels there.

The Origin, legal and assumed Jurisdiction,
 Severities, Subservience to arbitrary Power,
 and Abolition of the Court of Star-cham-
 ber, and of Trial by Juries.

With Observations on the proper Use of the
 Liberty of the Press, and its Abuses, parti-
 cularly of late with respect to the Colonies ;
 and a brief State of their Origin and poli-
 tical Nature, collected from various Acts
 of Princes and Parliaments.

Qui non libere veritatem pronunciat, proditor veritatis est.

Τὸλεύθερον δ' ἐκεῖνο, εἴ τις θέλει πώλει
 Χρησὸν τι βέλευμ' εἰς μέσον φέρειν, ἔχων.
 Καὶ ταῦθ' ὁ χρήζων, λαμπρὸς ἔσθ', ὁ μὴ θέλων,
 Σιγᾷ. τὶ τέτων ἐστὶν ἰσαίτερον πώλει;

Euripid. Hicetid.

L O N D O N
 Printed ; and Sold by S. BAKER, in York-Street, Covent-Garden.
 MDCCCLXVI.

THE

FORM

SPEECH and WRITING

PUBLISHED

FOR THE

NEW

LONDON

T H E

Freedom of Speech and Writing

U P O N

P U B L I C A F F A I R S,

C O N S I D E R E D, &c.

TRUTH is the perfect image, conception, or representation of things, by which their nature, state, and relations, are clearly discerned; the proper object of real knowledge, which, when attained, becomes the pure and pleasing light of the ingenuous mind. Prejudice on the other hand dignifies, adorns, debases, deforms, and, by innumerable ways, misrepresents for the more part the objects of our attention. By knowing all the necessary truth, our minds being well disposed, we are, in proportion to our talents, qualified for judgment, counsel or action, in public or private affairs. Through prejudice, the parent of ignorance and error, we mistake delusion for conviction, are misled and mislead, suffer and commit injuries unspeakable and irremediable. Truth is essential to justice and equity, which form the chief bands of society, the dignity of government, and the honour of human nature. Through prejudice partialities abound, the great law of consideration is daily broken, neglected or perverted, merit is supplanted, and artifice, weakness and wickedness, take the place of wisdom and goodness,

B

ness,

ness. But prejudice is not the sole enemy of truth, the passions frequently become its powerful foes, and by their various operations obstruct its progress. It is the office of reason to search out and support the truth, to prevent or extirpate prejudice, to direct the passions to their proper objects, and confine them within their proper limits; yet how often do prejudice and passion, single or united, prevail over reason, and make it subservient to their domination. All men, said my friend *Harpocrates*, are governed by an alternation of reason, passion, and prejudice, or by various combinations of these principles of human action; and let us survey the globe, mark its divisions, consider their prevailing opinions, and consequent practices, and then declare, if possible, in what proportions the whole, or any of its parts, are governed by these principles. If human knowledge be found unequal to this declaration, yet I presume we shall clearly perceive that, in all nations, prejudice and passion possess a large portion of dominion, and that the chief rulers and ministers, and the individuals of particular orders who form their resolutions, are sometimes so far influenced by them, that grievous mischiefs to the community, for whose sake they were appointed, ensue thereupon; so that all persons in authority have reason to revere the saying of *Vopiscus*, occasioned by the temperate conduct of the *Romans*, during the long interregnum which took place between the death of the emperor *Aurelian*, and the election of *Tacitus*. In order to the choice of a good prince, this author says, that “a strife between the senate and *Roman* army, not envious or severe, but grateful and conscientious, subsisted six whole months. How great was the concord of the soldiers, and quiet of the people, and how weighty was the authority of the senate? no tyrant rose up; under the government of the senate, the soldiers and the *Roman* people, the whole world was governed. They did not through fear of any prince or tribunicial power act thus rightly; but (*what is the best thing in life*) they feared themselves.”

It is the honour and happiness of a man to delight in truth, the friend of probity and wisdom, ever exercising a free judgment to seek her with diligence, and receive her with pleasure whencesoever she comes, and in whatever dress she appears; and the higher his station the greater honour and benefit he will receive from this disposition. *Darius* the son of *Hystaspes*,

Hystaspes [a], has perpetuated his fame by his conduct when he sat in the royal seat of judgment, surrounded by all the princes of *Persia* and *Media*, the governors, captains, lieutenants, and chief officers of his dominions, extending from *India* to *Ethiopia*; for upon special enquiry, and hearing of advocates, whether Wine, the King, Women, or Truth, were the strongest, when the advocate for Truth concluded his argument, saying, "Blessed be the God of Truth," all the people shouted and said, "Great is Truth, and mighty above all things;" and the king bestowed on him the noblest rewards. But although Truth, with the assistance of Time, be victorious; yet it is certain, that in many cases nearly affecting the welfare of individuals or societies, she comes not in season, and waits so long to be introduced by Time in her native beauty and force, that the occasions which called for her are past and gone, and she serves only to expose and condemn those errors and injuries whose consequences cannot be avoided. By her appearance in season she might have saved a person or a kingdom; but by her delay she becomes a sharp accuser, and a helpless friend. And it is certain that many persons, however well disposed, are unable, without special assistance, to form in their minds a circle of all the proper relatives of a subject, and after placing them in their order, duly to observe their united force respecting the central point of enquiry, and that many subjects of lasting importance to societies, by reason of the great number, and intricate nature of some, of their necessary parts, are not easily comprehended by wiser men, even when void of prejudice and passion, and possessed of all their relatives; and oftentimes some of these are industriously concealed, or otherwise unknown, and every art is practiced to dress up error in the guise of truth. In short, the difficulties that attend the acquirement of truth are frequently such that we have too much reason to remember the saying of the ancient philosopher, so often repeated by others, that she lies in the deep.

Truth being in its nature so noble, excellent, and useful, its enemies so formidable, and its acquirement so difficult, the free use of the means of discovering its merits, I apprehend, our special regard. Of these, it is evident, the chief are speech and writing, or printing, a species of writing

[a] 1 *Esdra*s, Chap. iii. and iv. and *Josephus* Antiq. B. xi. c. 3.

invented for the more expeditious multiplication of copies, both being modes of presenting to the eye what speech conveys to the ear ; yet the right, propriety, utility, and limits of their use touching political subjects, have occasioned much consideration, debate and difficulty in the world. Despotism cuts this matter short, and having swept away all the rights and liberties of the people, prohibits and punishes of course the use of the means of knowing the truth, which by setting before them in full light their natural, just, and immutable rights, together with the horrid state of their slavery, would consequently make them free, or at least indanger the quiet of that tyranny whose existence so much injures, dishonours, and debases human nature. Under other forms of government this matter has received different treatment in different countries, and in them at different periods. I shall not attempt to state these differences, but observe that freedom or restraint of speech and writing upon public affairs have generally been concomitant ; and power being in its nature progressive, they who are solicitous to augment the restraints of writing would, upon their success, in all probability, proceed in like manner to restrain liberty of speech ; and the more injurious the designs and actions of men are, the greater their solicitude will ever be to prevent the free examination of them ; wherefore those who desire to preserve the latter ought by all means to take due care of the former.

After giving this matter the best consideration in my power, it appears to me that the free examination of public measures, with a proper representation by speech or writing of the sense resulting from that examination, is the right of the members of a free state, and requisite for the preservation of their other rights ; and that all things published by persons for the sake of giving due information to their fellow subjects, in points mediately or immediately affecting the public welfare, are worthy of commendation. And it being certain, that even the proper remonstrance of the most worthy persons, made to their prince in consequence of their resolution not to become parties to his open violation of the laws of the kingdom, hath in time past been deemed libellous, I shall endeavour, notwithstanding so many excellent things said by others upon this important subject, a little farther to illustrate it. All things, every one is sensible, are best understood when known from their beginnings,
and

and considered in all their relations; and it appearing to me that the opinions of many *English* lawyers and others touching libels were originally drawn, in some measure at least, from a source in general unfavourable to liberty, I mean the *Roman* Imperial laws, I shall state them in the first place.

By what laws libels in general were governed from the dissolution of the common-wealth to the time of *Constantine* I have not been able clearly to discover; but am much inclined to think that they fell chiefly, if not wholly, under the *Cornelian* law *De Injuriis*, made by *Cornelius Sylla*, after his overthrow of the *Marian* faction, the regulation of the annual prætorian edicts, which, according to *Papinian*, were introduced for the sake of assisting, supplying, or correcting, the *civil* law for the public utility, or the perpetual edict, compiled by *Salvius Julianus*, an eminent lawyer, some time prætor, who, while governor of *Aquitain*, by command of the emperor *Adrian*, reduced into one body what was most equitable in the edicts for a long time yearly issued by the prætors; which being thus reduced, augmented, and ranged according to the order of the matters, was named the *Perpetual Edict*, because the emperor would have it perpetually observed throughout the empire, instead of the prætors annual edicts issued till that time. This edict being lost we have little farther knowledge of it than what may be collected from the *Digests*, which make part of the *Justinianean* body of the *civil* law, wherein are contained sundry parts of it, together with glosses of the ancient lawyers, and among them the following.

“ Dig. Lib. XLVII. Tit. 10. DE INJURIIS ET FAMOSIS LIBELLIS.”

“ 5. ULPIANUS, lib. 56. ad Edictum.”

“ § 9. Si quis librum ad infamiam alicujus pertinentem scripserit,
 “ composuerit, ediderit, dolove malo fecerit quo quid eorum fieret :
 “ etiamsi alterius nomine ediderit, vel sine nomine, uti de ea re agere
 “ liceret; et si condemnatus sit, qui id fecit, intestabilis ex lege esse
 “ jubetur.”

“ Digest,

“ Digest, Book XLVII. Title 10. OF INJURIES AND LIBELS.”

“ 5. ULPIAN, in the 56th book upon the Edict.”

“ § 9. If any person hath written, composed, or published a book
“ tending to defame any one, or with evil intent hath caused any such
“ thing to be done, although he hath published it under the name of
“ another, or without name, as if he might treat of that matter; if he
“ be condemned, who ever hath done this, by the law is ordained to be
“ intestable.”

“ 15. ULPIANUS, lib. 77. ad Edictum.”

“ § 25. Ait prætor: NE QUID INFAMANDI CAUSA FIAT: SI QUIS
“ ADVERSUS EA FECERIT, PROUT QUÆQUE RES ERIT, ANIMAD-
“ VERTAM.”

“ § 27. Generaliter vetuit prætor quid ad infamiam alicujus fieri.
“ Proinde quodcunque quis fecerit vel dixerit, ut alium infamet, erit
“ actio injuriarum. Hæc autem fere sunt quæ ad infamiam alicujus
“ fiunt—aut si carmen conscribat, vel proponat, vel cantet aliquod quod
“ pudorem alicujus lædat.”

“ 15. ULPIAN, in the 77th book upon the Edict.”

“ § 25. The Prætor saith, Let nothing be done for the sake of defam-
“ ing: if any person act contrary, I will animadvert according to the
“ nature of the matter.”

“ § 27. The Prætor generally forbiddeth any thing to be done to de-
“ fame any person. Consequently, whatsoever any person shall do or
“ say to defame another will give an action of injuries. And these are
“ the things usually done to defame any person,—or if he write, or
“ publish, or sing any thing that may offend another's modesty.”

Julius Paulus the lawyer, who lived in the former part of the third
century, in the 5th book of his received sentences, tit. 4. § 17. says
that “ Those who published infamous libels, to the contumely of ano-
“ ther, were subject to punishment *extra ordinem, usque ad relegationem*
“ *insulæ,*”

“*insula*,” by which I understand that they were punishable at the discretion of the Prætor, who might even confine them to an island.

The fragments of the *Gregorian* and *Hermoginian* codes, which were formed with intent to collect the constitutions of the emperors from *Adrian* to *Dioclesian*, make no mention of libels.

But whatever the laws relative to libels in general were that took place before the reign of *Constantine*, it is certain that this and other succeeding emperors endeavoured to suppress them by their rescripts and edicts. The *Theodosian* code, which was formed under the authority of the younger *Theodosius*, comprising the constitutions, with other *acta regia*, of sixteen emperors, from the year of our Lord 312 to 438, contains the following.

IX. Cod. Theodos. Tit. 34. DE FAMOSIS LIBELLIS.

“ I. Impp. CONSTANTINUS A. ad Verinum Vic. Africae.”

“ SI quando famosi libelli reperiantur, nullas exinde calumnias patiantur hii, quorum de factis vel nominibus aliquid continebunt, sed
“ scriptionis auctor potius requiratur; & repertus cum omni vigore
“ cogatur his de rebus quas proponendas credidit, comprobare: nec tamen
“ supplicio, etiamsi aliquid ostenderit, subtrahatur. P. P. III. Kalend.
“ April. Karthag. Constantino. A. V. & Licinio Cæs. Coss. [319.]”

“ II. Idem A. ad Helianum Proc. Afric.”

“ LICET serventur in officio Tuo, et vicarii, exemplaria Libellorum,
“ qui in Africa oblatis sunt, tamen eos, quorum nomina continent, metu
“ absolutos securitate perfrui sinas; solumque moneas, *Ut ab omni non
“ solum crimine, sed etiam suspicione verisimili alieni esse festinent*: Nam
“ qui accusandi fiduciam gerit, oportet comprobare, nec occultare quæ
“ scierit: quoniam prædicabilis erit ad dicationem publicam meritò per-
“ venturus. P. P. V. Kal. Mar. Cathagine. Constantin. A. VI. & Con-
“ stantio Cæs. Coss. [320.]”

“ III. Idem A. ad Januarium agentem Vicariam præfecturam.”

“ UT accusatoribus patientia præbenda est, si quem persequi in judicio
“ volunt, ita famosis libellis fides habenda non est, nec super his ad

“ Nostram Scientiam referendum, cum eosdem libellos protinus conducatur
 “ aboleri, quorum auctor nullus existit. P. P. Prid. Non. Decemb. Rom.
 “ Constantino. A. VI. et Constantio Cæs. Coss. [320.] ”

“ IV. Idem A. ad Dionysium. ”

“ FAMOSA scriptio libellorum, quæ nomine accusatoris caret, minimè
 “ examinanda est, sed penitus abolenda : nam qui accusationis promo-
 “ tione confidat, liberâ potiùs intentione, quam captiosâ atque occultâ
 “ conscriptione, alterius debet vitam in *judicium* devocare. P. P. Tyro,
 “ XII. Kalend. Nov. Januarino et Justo Coss. [328.] ”

“ V. Imp. CONSTANTIUS A. ad Afros. ”

“ LIBELLIS, quos *famosos* vocant, si fieri possit abolendis, Inclytus
 “ Pater noster providit : et hujus modi libellos, *Ne in cognitionem quidem*
 “ *suam, vel publicam* jussit *admitti* : Non igitur vita cujusquam, non
 “ dignitas concussa his machinis vacillabit. Nam omnes hujusmodi
 “ libellos concremari decernimus. Dat. XIV. Kal. Jul. Urso et Polemio
 “ Coss. [338.] ”

“ VI. Idem A. ad Populum. ”

“ NEMO prorsus de famosis libellis, qui ne que aput Me, neque in ju-
 “ diciis ullum obtinent locum, calumniam patiatur : *Nam et innocens cre-*
 “ *ditur, cui defuit accusator, cum non defuerit inimicus.* Dat. Prid. Kal.
 “ Nov. Med. Arbitione et Lolliano Coss. [355.] ”

“ VII. Impp. Valentinianus, et VALENS AA. Edictum. ”

“ FAMOSORUM infame nomen est LIBELLORUM. Ac si quis vel colli-
 “ gendos, vel legendos putaverit, ac non statim chartas igni consumpserit,
 “ sciat se capitali sententiâ subjugandum. Sanè si quis devotionis suæ ac
 “ salutis publicæ custodiam gerit, nomen suum profiteatur, et ea quæ per
 “ famosum prosequenda putavit, ore proprio edicat : ita ut absque ulla
 “ trepidatione accedat, sciens, quod si adsertionibus veri fides fuerit opi-
 “ tulata, laudem maximam ac præmium a Nostra Clementia consequetur.
 “ Dat. XIV. Kal. Mar. Constantinop. Valentiniano et Valente A.A. Coss.
 “ [365.] ”

“ VIII. ”

“ VIII. Idem A A. ad Florianum Com.”

“ JAMPRIDEM adversus calumnias firmissima sunt præsidia comparata.
 “ Nullus igitur calumniam metuat : contestatio verò, quæ caput alterius
 “ contra juris ordinem pulsât, depressa nostris Legibus jaceat ; intercidat
 “ furor famosorum (sæpe ut constituimus) libellorum, &c. Dat. V. Id.
 “ Novemb. Martianop. Valentiniano et Valente AA. Coss.”

“ IX. Imppp. Valentinianus, THEODOSIUS et Arcadius A A A.”

“ Cynegio P. P.”

“ SI quis famosum libellum sive domi, sive in publico, vel quocunque
 “ loco ignarus offenderit, aut discerpât priùs quàm alter inveniât, aut
 “ nulli confiteatur inventum : Nemini denique, si tam curiosus est, re-
 “ ferat, *Quid legendo cognoverit*. Nam quicumque obtulerit inventum,
 “ certum est ipsum reum ex lege retinendum, nisi proderit auctorem :
 “ Nec evasurum pœnam hujusmodi criminibus constitutam, si proditus
 “ fuerit cuiquam retulisse *Quod legerit*. Dat. XIV. Kalend. Feb. Con-
 “ stantinop. Honor. N. B. P. et Evodio Coss. [386.]”

“ X. Imppp. ARCAD. Honor. et Theod. A A A. Anthemio P. P.”

“ et Patricio.”

“ UNIVERSI, qui famosis libellis inimicis suis velut venenatum quod-
 “ dam telum injecerint, hii etiam, qui famosam seriem scriptionis im-
 “ pudenti agnita lectione non ilicò discerpserint, vel flammis exusserint,
 “ vel lectorem cognitum prodiderint, ultorem suis cervicibus gladium
 “ reformident. Dat. IV. Kal. Maii, Constantinop. Arcad. A. VI. et
 “ Probo Coss. [406.]”

“ IX. Theodosian Code. Title 34. OF LIBELS.”

1. “ The august emperor CONSTANTINE, to Verinus, lieutenant of
 “ Africa.”

“ If at any time libels be found, let not those concerning whose
 “ actions or reputation any thing be contained in them suffer any calumny
 “ thereby ; but rather let the author of the writing be sought out, and
 “ being

“ being found be compelled, even by torture, to give proof of the
 “ things he has thought fit to publish; however, let him not escape
 “ punishment though he should prove something. Given, March the
 “ 30th, at Carthage, the august Constantine the 5th time, and Licinius
 “ Cæsar being Consuls. [319.] ” [b].

2. “ The same august emperour to Helianus, proconsul of Africa.”

“ Although there be kept in your office, and in the office of the
 “ lieutenant, copies of libels which have been presented in Africa; yet
 “ let those whose names they contain enjoy uninterrupted security, and
 “ only admonish them that they hasten to avoid not only every crime,
 “ but also probable suspicion; for he who hath confidence to accuse
 “ ought to prove, and not conceal what he knoweth; because he who
 “ is worthy of praise will with good reason come to public judgment.
 “ Given, Feb. the 25th, at Carthage. The august Constantine the 6th
 “ time, and Constantius Cæsar being Consuls [320.]

3. “ The same august emperour to Januarius, vice prefect.”

“ As patience is to be shewn to accusers prosecuting any person in
 “ judgment, so no credit is to be given to libels, nor are they to be re-
 “ ferred to our knowledge, as such libels ought forthwith to be burnt
 “ of which there is no author. Given Decemb, the 4th, at Rome.
 “ The august Constantine the 6th time, and Constantius Cæsar being
 “ Consuls [320.] ”

4. “ The same august emperour to Dionysius.”

“ A defamatory writing which hath not the accusers name is by no
 “ means to be examined, but utterly destroyed; for he who hath confi-

[b] *Constantine*, although he generally governed with clemency, was so far capable of cruelty, that in the early part of his reign having obtained several victories over the *Franks* or *French*, a people composed of parts of various northern nations, who to denote their freedom took to themselves the name of *Franks*, and made two of their kings prisoners, he exposed them to wild beasts in the amphitheatre; and in the latter part of his reign he put to death his son *Crispus*, an accomplished youth, on the false accusation of his mother-in-law *Fausta*, that he had made an attempt upon her honour, whereas in truth she had attempted to seduce him. After confessing her crime, he also put her to death.

“ dence to accuse ought by an open charge, rather than a captious and
“ insidious writing, to call into *judgment* the life of another. Given at
“ Tyre, Octob. the 21st. Januarius and Justus being consuls [328.]

5. “ The august emperor CONSTANTIUS to the Africans.”

“ Our illustrious father made provision for abolishing if possible those
“ writings which are called libels, and commanded that such kind of
“ writings *should not be admitted to the knowledge of himself or the pub-*
“ *lic.* Therefore neither the life nor dignity of any person battered by
“ these engines shall be shaken ; for we decree that all writings of this
“ kind be burnt. Given the 18th of June. Urfus and Polemius being
“ consuls [338.]”

6. “ The same emperor, to the people [of Rome.]”

“ Let no person in any wise suffer calumny from libels, which receive
“ no countenance with me, nor in judgments ; *for he is believed to be*
“ *innocent who hath no accuser, though he hath an enemy.* Given the
“ 31st of October, at Milan. Arbitio and Lollianus being consuls [355.]”

7. “ The august emperours Valentinian and VALENS, An Edict.”

“ The name of LIBELS is infamous ; and if any person shall think
“ they are either to be retained or published, and shall not immediately
“ burn them, be it known to him that he shall be capitally punished.
“ Verily if any person regardeth his own duty and the public welfare,
“ let him declare his name, and make oral publication of what he hath
“ thought fit to discourse of by a libel ; so as he may come without any fear,
“ knowing that if his assertions be supported by truth, he will receive
“ the greatest praise and reward from our clemency. Given the 16th
“ of February, at Constantinople. The august Valentinian and Valens
“ being consuls [365.]”

8. “ The same august emperours to Florianus.”

“ The firmest defence against calumnies hath been already procured. Let
“ no person therefore fear calumny. That objection of crime which striketh
“ at the head of another contrary to the order of law, be it depressed by

“ our laws : together with it perish the rage of libels, &c. (as we have
 “ often decreed.) Given the 9th of Novemb. at Martianople. The
 “ august Valentinian and Valens being consuls.”

9. “ The august emperours Valentinian, THEODOSIUS, and Arcadius,
 “ to the prætorian prefect Cynegius.”

“ If any person shall unwittingly find a libel at home or abroad, or in
 “ any place, let him either tear it before another find it, or confess the
 “ finding of it to no person. Lastly, let him relate to no person *what*
 “ *he hath discovered by reading it*, if he be so curious. For whosoever
 “ shall communicate it when found, is certainly to be held guilty by the
 “ law, unless he shall produce the author. Neither shall he escape the
 “ punishment appointed for crimes of this kind, if he be convicted of
 “ having related to any person *what he hath read*. Given the 19th of
 “ January, at Constantinople. Honorius and Evodius being consuls.
 “ [386.]”

10. “ The august emperours ARCADIUS, Honorius and Theodosius, to
 “ Anthemius prætorian prefect, and of the council.”

“ Let all who by libels shall cast a kind of poisoned dart at their
 “ enemies, and those also who having heard the scandalous contents of
 “ the libel do not immediately tear or burn it, or produce the author
 “ when known, dread the avenging sword on their necks. Given the
 “ 28th of April, at Constantinople. The august Arcadius the 6th time,
 “ and Probus being consuls [406.]”

The body of the *civil* Law, comprizing all the prior laws of the
 empire, intended and ordained to remain in force, with such illustra-
 tions and additions as were thought requisite, compiled and established
 by the authority of the emperor *Justinian*, besides the above citations from
 the Digests, contains what follows.

“ Instit. Lib. IV. Tit. 4. DE INJURIIS.”

“ Injuria autem committitur non solum cum quis pugno pulsatus, aut
 “ fustibus cæsus, vel etiam verberatus erit ; sed et si cui convitium factum
 “ fuerit

“ fuerit — vel si quis ad infamiam alicujus libellum aut carmen aut
 “ historiam scripserit, composuerit, ediderit, dolove malo fecerit quo quid
 “ eorum fieret.”

“ Institutes, Book IV. Title 4. OF INJURIES.”

“ Now an injury is committed not only when any person is beaten
 “ with the fist, or bruised, or wounded with clubs; but also if a person
 “ be reproached,— or if any person hath written, composed, or published
 “ a libel, or song, or history to defame another, or with evil intent hath
 “ caused any of these things to be done.”

“ Cod. Lib. IX. Tit. 36. DE FAMOSIS LIBELLIS.”

1. “ Impp. VALENTINIANUS et VALENS, AA. Edictum.”

“ Si quis famosum libellum, five domi, five in publico, vel quocunque
 “ loco ignarus repererit : aut corrumpat prius quam alter inveniatur, aut
 “ nulli confiteatur inventum. Si vero non statim easdem chartulas vel
 “ corruerit, vel igni consumpserit, sed vim earum manifestaverit, sciat se
 “ quasi auctorem hujusmodi delicti capitali sententiæ subjugandum. Sane
 “ si quis devotionis suæ, ac salutis publicæ custodiam gerit, nomen suum
 “ profiteatur, et quæ per famosum (libellum) persequenda putaverit, ore
 “ proprio edicat : ita ut absque ulla trepidatione accedat, sciens (quidem)
 “ quod si adsertionibus (suis) veri fides fuerit opitulata, laudem maximam
 “ et præmium a nostra clementia consequetur. Sin vero minimè hæc vera
 “ ostenderit, capitali pœna plectetur. Hujusmodi autem libellus alterius
 “ opinionem non lædat. P. P. XVI. Kalend. Mart. *Constantinop.* VA-
 “ LENTINIANO et VALENTE, AA. Coss. [365.]

“ Code Book IX. Title 36. OF LIBELS.

1. “ Edict of the august emperours VALENTINIAN and VALENS.”

“ If any person shall unwittingly find a libel, either at home or abroad,
 “ or in any place, let him either destroy it before another see it,
 “ or confess the finding it to no person. But if he do not immediately
 “ destroy or burn the said papers, but declare their contents, be it known
 “ to him that he shall be capitally punished, as if he were the author
 “ of such crime. Verily, if any person regard his own duty, and the
 “ public

“ public welfare, let him make known his name, and declare with his
 “ mouth those things which he hath thought should be prosecuted by a
 “ libel, so that he may approach without any fear, knowing certainly
 “ that if his assertions be worthy of credit, he will obtain the greatest
 “ praise and reward from our clemency ; but if he do not prove such
 “ things to be true, he shall be capitally punished. And a libel of this
 “ kind shall not hurt the character of another. To the Prætorian præfect.
 “ February the 14th, Constantinople. The august Valentinian and
 “ Valens being consuls. [365.]”

Before these compilations of *Justinian* a great part of the empire of the West was irrecoverably lost. Soon after his death the *Goths* making fresh incursions got possession of *Italy* ; to them succeeded the *Lombards*. By these ravages, together with the disinclination of all the old *Roman* subjects to preserve a body of laws which they had received with impatience from *Constantinople*, *Justinians* laws were totally lost in the West : and in the East, after continuing in force about seventy years, they suffered discredit through design of the emperor, or rather tyrant *Phocas*, by whose command they were translated into the *Greek* tongue, introduced by his order into the forum as well as the schools, instead of the *Latin*, the institutes being translated by way of paraphrase. These translations continued in use about 260 years, till the time of the emperor *Basil*, who began his reign in the year 867, from which epocha the Learned date the fall of the laws of *Justinian* in the eastern empire, the body of laws begun by this emperor, and completed by his sons *Leo* and *Constantine*, continuing in force till the dissolution of the empire by the taking of *Constantinople* in 1453. And thus *Justinians* body of laws lost their force in the East ; but in the year 1130, in the war for the papacy, some soldiers of the emperor *Lotharius*, in pillaging the city *Amalfi*, found *Justinians* Digests or Pandeets, which *Lotharius* so highly approved, that he afterwards established *Justinians* laws in *Germany* and *Italy*. In consequence of this and other discoveries, with the Imperial favour and establishment, *Justinians* laws became generally known by the Learned in all the states of *Europe*, and received by most of them for their government in different proportions, the greater part being chiefly govern-
 ed

ed by them. This wonderful progress and admission of a body of laws into so many countries wherein the legislator had no authority at the time of their making, and which had so long before totally lost all their force in the country wherein they were made, are frequently ascribed by authors to their great utility and excellence. Others have observed, that these laws favouring the ecclesiastics in several respects, and being helpful to them to form their canon laws, the chains whereby they enslaved the *Christian* world, they contributed not a little by their influence to their reception, though the popes afterwards scrupled not at their pleasure to rescind them. The illustrious father *Paul*, in his treatise of matters beneficiary, observes that *Gregory* the IXth, in imitation of *Theodosius* and *Justinian*, who formed their codes for the politic of the empire, framed a politic—which began to lay the foundation, and to establish the *Roman* monarchy, chiefly in beneficial matters—and that the old collectors of canons, particularly *Gratian*, made a collection of all that he accounted proper to the papal greatness, yet not without changes, alterations and falsifications—and it was believed by him he had raised that authority to the greatest height it could attain unto; and for those times he was not mistaken. The Decretum of *Gratian* was composed in the year 1151, and *Gregory* was created pope in the year 1227. But there was another prevailing reason for the general reception of *Justinians* laws, less noticed than its importance deserves, which was their favouring the power of princes. The author of the History of the Origin of the *French* Laws, a learned treatise first published about the year 1708, and supposed to have been written by the eminent monsieur *Argout*, and since his death usually prefixed to his Institutes of the *French* Laws, speaking of *Justinians* law, after highly commending it for its general use and advantage, expresses himself thus. “ But it was chiefly of service to princes, whose prerogative is therein extended in its full dimensions, free from those fatal blemishes it had suffered in the foregoing ages; nay, it furnished them with matter to build very high pretensions. The emperor of *Germany*, as some doctors explained this law to him, had a right to universal monarchy, and others said, that kings were absolute emperours within their own dominions.”

— for the better understanding the nature of this law, I shall produce the following passages.

“ Dig. Lib. I. Tit. 4. DE CONSTITUTIONIBUS PRINCIPUM.”

“ ULPIANUS, lib. I. Institutionum.”

“ Quod principi placuit legis habet vigorem : ut pote cum *Lege regia*,
 “ quæ de imperio ejus lata est, populus ei & in eum omne suum imperium
 “ et potestatem conferat. § 1. Quodcunque igitur imperator per epistolam
 “ et subscriptionem statuit, vel cognoscens decrevit, vel de plano interlo-
 “ cutus est, vel edicto præcepit, legem esse constat. Hæc sunt quas vulgo
 “ *Constitutiones* appellamus. § 2. Plane ex his quædam sunt personales,
 “ nec ad exemplum trahuntur : nam quod princeps alicui ob merita
 “ indulgit, vel si quam pænam irrogavit, vel si cui sine exemplo subvenit,
 “ personam non egreditur.”

“ Digests, B. I. Tit. 4. Of the Constitutions of Princes.”

“ Ulpian, Book I. Of Institutions.”

“ What pleaseth the prince hath the force of law ; in as much as by the
 “ regal law made respecting his government the people confer on him all
 “ their authority and power. 1. Whatever therefore the emperour by letter
 “ and subscription hath appointed, or hath judicially decreed, or in other
 “ manner declared [c], or by edict enjoined, appeareth to be law. These
 “ are what we commonly call *Constitutions*. § 2. Of these some plainly
 “ are personal, and not to be drawn into example ; for what the prince
 “ hath indulged as a reward of merit, or if he hath imposed a punishment,
 “ or given to any one unexampled succour, this matter extendeth not
 “ beyond the person.”

[c] The words *de plano interlocutus est*, which are here rendered, “ in other manner de-
 “ clared,” signify to take cognizance on the level ground, that is, not on the tribunal, or
 judgment seat, but in the street, or in passing along, when the magistrate is going either to
 the baths, to take the air, or to the games ; for to take cognizance from the tribunal is to
 do so not from the level ground, but from an eminence. And the lawyers use *pro tribunali*
 and *de plano* as opposite phrases.

“ Instit.

“ Instit. Lib. I. Tit. 2. De Jure Naturali, Gentium et Civili.”
“ § 6. Sed et quod principi placuit legis habet vigorem; quum lege
“ regia, quæ de ejus imperio lata est, populus ei et in eum omne impe-
“ rium suum et potestatem concedat. Quodcunque ergo imperator per
“ epistolam constituit, vel cognoscens decrevit, vel edicto præcepit, legem
“ esse constat: hæc sunt, quæ constitutiones appellantur. Plane ex his
“ quædam sunt personales, quæ nec ad exemplum trahuntur: [quoniam
“ non hoc princeps vult.] Nam quod alicui ob meritum indulget, vel si
“ quam pœnam irrogavit, vel si cui sine exemplo subvenit, personam non
“ transgreditur. Aliæ autem, quum generales sint, omnes procul dubio
“ tenent.”

“ Institutes, B. I. Title 2. Of the Law Natural, of Nations and Civil.”

“ § 6. But also what pleaseth the prince hath the force of law; in
“ as much as by the regal law made respecting his government the people
“ yield unto him all their authority and power. Whatever therefore
“ the emperour by letter hath appointed, or hath judiciously decreed, or
“ by edict enjoined, appeareth to be law. These are what are called Con-
“ stitutions. Of these some are plainly personal, and not to be drawn
“ into example [because the prince will not have it so] for what he hath
“ indulged to any person for his merit, or if he hath imposed a punish-
“ ment, or hath given to any one unexampled succour, it passeth not
“ beyond the person. But others being general doubtless bind all per-
“ sons.”

In this law and the lust of domination were founded all those exorbi-
tant claims and extensions of power which have wholly or nearly swept
away all the liberties of the neighbouring states, without leaving in some
the least appearance of those orders which were instituted for their pre-
servation. It is an ancient as well as evident and important political
principle, that the laws of every state should be agreeable to its particu-
lar nature. Without due observance of this maxim the constitution will
inevitably be changed; and in mixed governments, when the understand-
ing or virtues necessary in season to discern, and with proper resolution

to oppose, all accroaching power in the prince, who has the forces of the state in his hands, are wanting in those who are appointed to guard the common liberties, the declension of their authority will of course ensue; and if by any means they unhappily become subservient to that domination which they ought, if possible, to prevent, they consequently lose the love of the people, and the respect of the power they help to raise, and so prepare their own annihilation, or by their continuance become a grievance instead of a blessing to the people. The *Roman* Imperial government was absolute, and likewise tyrannical when the casual goodness of the emperor did not prevent it. Every absolute government is manifestly in its nature a tyranny *in posse*; the temperate use of power may take place to day; but a tyranny *in esse* may succeed to-morrow: and although *Justinians* laws might contain excellent regulations in many respects; yet as they were framed for the support of Imperial authority, being composed and given in a state wherein all things centered in the absolute power of the prince, so far as they related to power they were in their nature unfit for the government of limited monarchies. But when these laws were received, the ecclesiastics were the chief possessors of what learning there was in the world; their oppressions were manifold, and power was the object of mutual desire in priests and princes; and others who should have laboured to prevent their general reception were probably insensible that they were pregnant with so great danger and mischief, having no apprehensions that a book pickt out of the rubbish at *Amalfi* could possibly introduce such grievous injuries to their posterity.

This whole matter gives cause, if it were wanted, to applaud the wisdom of those who have prescribed to the members of mixed governments jealousy, as a necessary antidote against that fatal disease arbitrary power; and we have reason to revere the memory of those who prevented a farther reception of these laws, which by favouring the advances heretofore made towards absolute power would have augmented the danger of the common liberty, if not involved us in the same state with our neighbours, especially considering, together with the power and influence of those who were inclined to this reception, the progress which they had made.

Dr. Duck, in his treatise *Of the Use and Authority of the Civil Law of the Romans in the Dominions of Christian Princes*, finished in the year 1648, and published in 1653, with respect to its use in *England*, in the first place says, “The *English* have ever carefully preserved their laws, and whensoever in parliament attempt has been made to change them according to the equity of the *Roman* law, though otherwise with justice enough, they have ever opposed it, of which there are several instances in the journals. In a parliament under *Henry III.* when the bishops moved for an act to legitimate children by subsequent marriage, as *Justinian* had upon good reason appointed, as expressed in the constitution for that purpose, and the church had allowed the same, the earls and barons unanimously answered, *Nolumus leges Angliæ mutari, quæ huc usque usu sunt approbatæ; We will not suffer the laws of England, hitherto approved by use to be changed.* In the parliament under *Richard II.* when *Thomas* duke of *Glocester* and other nobles accused *Alexander Nevil* archbishop of *York*, *Robert de Vere* duke of *Ireland*, and others of treason, and the common lawyers and civilians being required to give their opinion had answered that the form of the accusation was not rightly drawn, either according to the law of *England* or the civil law, the earls and barons said it was right according to the parliamentary laws, and protested they would never suffer the kingdom of *England* to be governed by the civil law of the *Romans*; and though this might perhaps in those times proceed from sudden heat and factious disposition, yet it has been ever since duly observed, and all authority and use of the civil law utterly excluded from the courts of justice, wherein the law of *England* is practiced.”

Afterwards he shews how far the civil law was introduced, and its professors favoured; and in particular says, “The first writer upon the *English* law is *R. Glanvil*, chief justice under *Henry II.*; after him *Henry Bracton*, likewise chief justice under *Henry III.*; then *John Britton* justice of *England*: and under *Edward I.* *Gilbert Thornton*, chief justice of *England*, abridged *Bracton*; and under the same king an uncertain author, called *Fleta*, whom the celebrated *Selden* hath lately published and illustrated, hath revived the buried name of *Thornton*.” — “Now these *English* lawyers were excellently well

“ versed in the *civil* law, whence they have received very much for ex-
 “ plaining and adorning the *English* law. *Bracton* was professor of the
 “ *Cæsarean* law at *Oxford*, and *Britton* doctor of laws; and *Glanvil* and
 “ *Bracton* begin their books in the words and method of *Justinian* in
 “ the *Institutes*; and in their treatises often cite the testimonies and au-
 “ thority of the *civil* law for deciding the most weighty controversies,
 “ not only in *private* causes, but in such as relate to the *public* admini-
 “ stration; and from king *Stephen*, for about two hundred years, till the
 “ time of *Edward III.* so great was the study of the *Roman* laws here,
 “ not only in the universities, but at the bar, that in the reports and
 “ judgments of causes, and in the pleadings of advocates, are very
 “ frequent quotations of the *civil* law, which *Selden* hath proved by
 “ many testimonies, in his discourse upon *Fleta*; and the professors of
 “ the *civil* law were in so high esteem in those times, that under *Henry*
 “ *II.* there were several skilled therein, who were also clerks, *Simon de*
 “ *Pateshull*, dean of *St. Pauls*, *Philip Lovell*, *John Mansel*, and many
 “ others, advanced to be judges in the supreme courts of justice.”

“ To be short, our kings have ever cast a favourable eye on the bishops,
 “ clerks, and professors of the *civil* law, preferring them generally to the
 “ chief offices of the government, as our historians do witness; and in
 “ the reign of *Edward III.* all the great offices of chancellor, treasurer,
 “ keeper of the privy seal, of the rolls, of the wardrobe, chancellor of
 “ the exchequer, and almost all other public offices were committed to
 “ them.”——“ The courts in which by the custom of *England* they
 “ proceed by the *civil* law only, are reducible to three heads; 1. The
 “ military court, under the constable and marshal of *England*. 2. The
 “ court of admiralty. 3. All the ecclesiastical courts, under the arch-
 “ bishops, bishops, and archdeacons, which have all hitherto been in the
 “ hands of *civilians*.”

He afterwards sets forth the numerous causes which are determined
 in the ecclesiastical court by the *civil* and *canon* law, together with the
 provincial constitutions of *Canterbury* &c. and says, “ As to the *civil* law
 “ there is no dispute, for it has been received by the consent of all, and
 “ in this court is called, *the law of the land*,” adding a little after,
 “ among the courts of *England* wherein justice is administred by the

“ *Roman*

“Roman laws, we must not omit the privileges of our kings granted to the two universities of *Oxford* and *Cambridge*.” And it may be remembered that so late as in the latter part of the reign of king *James*, and beginning of the succeeding reign, Dr. *Williams*, while bishop of *Lincoln*, was lord keeper; and that king *Charles* appointed archbishop *Laud* one of the commissioners of the treasury, and by his influence Dr. *Juxon* bishop of *London* lord treasurer.

In justice to the memory of the ancient writers upon the *English* laws it is to be observed that altho’ their works contain many things of moment taken from the *civil* law, relative to the public administration, as well as to private causes, yet they studiously tempered the power of the prince with law and equity, and even expounded those words of the passage before cited from the *Digests* and the *Institutes*, which strictly taken gave the force of law to the princes pleasure, in a sense very different from that which was usually given to them by the *Greek* or *Latin* expositors, who adhering to the letter favoured the absolute power of the prince.

With respect to libels, *Glanvil*, who enumerates many offences, makes no mention of them. *Bracton* in his third book, tract. *de Corona*, fol. 155, has the following words, being evidently taken, though not cited, from *Justinians Institutes*. *Fit autem injuria non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus cæsus, verum cum ei convitium dictum fuerit, vel de eo factum carmen famosum, et hujus modi*, which is the only passage touching libels that I have seen in those ancient writers. *Stamford*, in his *Pleas of the Crown*, makes no mention of libels.

The *Scots* seem early to have introduced the *Roman* laws in a considerable measure for their government, in conjunction with their municipal laws, notwithstanding what is contained in the following passage in *Buchanans* history of their affairs in the year 1532. “There having been
“from the earliest times no stated days in *Scotland* or certain place for
“judging pecuniary contests among the citizens, *John* duke of *Albany*
“obtained of the pope, that an annual sum of money, sufficient to pay
“the salary of a few judges, should be imposed on the whole ecclesiastic
“order, and each person assessed in proportion to their benefice. *Garwen*

“*Dunbar*,

“ *Dunbar*, bishop of *Aberdeen*, in behalf of himself and other priests,
 “ appealed to the pope. This controversy held from the 11th of March
 “ to the 24th of April, when a college of judges was established at
 “ *Edinburgh*. Altho’ at the beginning they devised many things com-
 “ modiously for the equal distribution of justice the event was not
 “ answerable to expectation; for as in *Scotland* there are scarce any
 “ laws save acts of parliaments, and the more part of those not per-
 “ petual, but temporary, and the judges do what they can to prevent the
 “ enacting of laws, the estates of all the citizens were committed to the
 “ determination of fifteen men, whose power is perpetual, and their go-
 “ vernement evidently tyrannical; their sole decisions being laws.”

Sir *George Mackenzie*, advocate to the kings *Charles* II^d. and *James* VIIth. in a treatise entitled, “ *The Laws and Customs of Scotland in*
 “ *matters criminal*,” part 1st. tit. 1st. § 3. says, “ We follow the *civil*
 “ law in judging crimes, as is clear by several acts of parliament, wherein
 “ the *civil* law is called the common law.”—“ King *James* Vth. was so
 “ fond of the *civil* law, as *Boet.* observes *lib.* 17. that he made an act
 “ ordaining that no man should succeed to a great estate in *Scotland* who
 “ did not understand the *civil* law; and erected two professions of it,
 “ one at *St. Andrews*, and another at *Aberdeen*.”

“ Tit. 30. § 5. He says,” “ Infamous libels, *libelli famosi*, are the
 “ most permanent of all injuries, and therefore are most severely pu-
 “ nished, and in it the offender shews more design, and therefore is more
 “ guilty.”

“ The punishment of this *delict* was of old arbitrary, *Paul.* lib. 5.
 “ *Sent. tit.* 4. But was made capital by the edict *Valentiniani & Valentis.*
 “ *L. unic. C. de fam. libel.* But *Clar.* makes it arbitrary by the pre-
 “ sent custom of *Europe*; and so it is with us at present in *Scotland*,
 “ except where the prince is abused, or where a capital crime is alledged
 “ against any man; for *eo casu* infamous libels are justly punished by
 “ death.” “ And thus *Fleming* was hanged for saying, *that he wisht*
 “ *that the king would shoot to dead, and die of the falling sickness*, 17 May
 “ 1615. But in this the words were maliciously spoken, for the speaker
 “ uttered them because he had lost a plea.”

Having

Having stated the *Imperial* laws against libels, with the power of the princes who ordained them; and *Constantine* having expressly, and other emperours consequentially, subjected libellers to torture, the usual proceeding at the *civil* law against persons accused of capital crimes, I shall from the writings of others set forth the nature of torture, apprehending that the whole will give us reason to encrease and preserve our regard for our mild and happy constitution, with the exercise of those virtues which are necessary in point of execution, without which it is manifest the benefits intended by the wisest institutions cannot be enjoyed.

HEINECCIUS. vol. 5. part 7. Of his "Elements of the Civil Law according to the Pandects."

Tit. 18. Of examinations by Torture.

"Nor is examination made by torture, in order to draw out confession of a crime, of which there is good cause of suspicion [*non ob- scuris indiciiis confirmati*] less to be reckoned among those things which are common to all public judgments, which altho' it be a frail and and dangerous mean has been formerly adopted by several nations as a necessary evil. With respect to the *Athenians* and *Rhodians* at least we have the evidence of *Cicero*. As to the people of *Germanic* original it appeareth from the 4th law of the *Wifigots*, &c."

"Whence flow axioms. 1. examination by torture properly pertained to servants. 2. They were to be used for drawing out the truth. 3. When there were the strongest appearances [*indiciis*] of a heinous crime."

"As therefore examinations by torture pertained properly to servants, the reason is obvious why they might be tortured either as delinquents or witnesses; yet not against their masters, unless in crimes of treason, adultery, and some others of an atrocious nature, and why men of a lower degree formerly seemed to be of the same condition, if they were either prosecuted as criminals, or produced as witnesses."

“ From the same axiom it appeareth why by our law [d] noble and
 “ honourable persons, bishops and presbyters, professors of arts, decu-
 “ rions, and their children to the third decree, soldiers, and their child-
 “ ren of the first degree [e], are exempt from examination by torture.”

“ And as tortures are to be used only for drawing out the truth, conse-
 “ quently 1, they are not to be exercised upon those from whom there is
 “ no prospect of obtaining it, as mad persons, and children. 2, nor upon
 “ old men, or women with child, as death might be thereby occasioned;
 “ and if the judge fraudently command any person to be tortured to
 “ death, he is punishable by the *Cornelian* law *de Sicariis*; or if he hath
 “ done it thro’ error and ignorance he is subject to punishment extra-
 “ ordinary.”

“ From the same axiom the ancients inferred that order is to be ob-
 “ served in torturing several persons accused, by beginning with the most
 “ suspected, or the weaker; who therefore seem easier to be overcome
 “ by pain; that a criminal convict, but not having confessed, may be tor-
 “ tured respecting the guilt of others; that tortures may be repeated, if
 “ it appear from new supervening signs of guilt [*indiciis*,] that the cri-
 “ minal had obstinately hardened himself under the torture.”

“ Nor do we less hence infer that not such torments are to be used
 “ as the accuser requires, but such as are legitimate [f]; and that those
 “ are to be attempered by the judge according to the appearances of
 “ guilt in the person accused, and the atrocity of the crime, lest the
 “ mean of obtaining the truth be more grievous than the imminent pu-
 “ nishment itself.”

“ Lastly, as tortures take place only where there are the strongest ap-
 “ pearances of guilt, consequently, 1, they are not to be begun with.
 “ 2, they are to be used only on the suspicion of a capital crime, and,
 “ 3, in such manner as that confession alone may seem to be wanting.
 “ 4, the person accused firmly denying, or revoking the confession, and

[d] The law of *Prussia*.

[e] But all privilege of dignity ceaseth in the greater crimes, as of rebellion and treason, fraud [*falsi*] poisoning, with which we see is reckoned heresy by the principles of the heretic-
 scourgers.

[f] Among the torments used by the *Romans* were, burning, stripes, goads, irons for the neck or feet, collars, or yokes, pincers, cords, barbed darts, and chiefly the rack.

“ persevering therein, is to be adjudged to have cleared himself, and
“ therefore is to be acquitted.”

“ *Nemesis Carolina* observeth nearly the same things. This only is to
“ be noted, 1, that in the present custom not so much regard is had to
“ dignity. 2, that many marks [*indicia*] of crimes which seem to require
“ the use of tortures are recounted in that *Carolina* constitution, as well
“ those that are general, as the special, of homicide, infanticide, poison-
“ ing, theft, and rapine, burning, magic, and fortune-telling. 3, that the
“ degrees of torture are at present for the most part three, altho’ differ-
“ ent instruments are used in different places. 4, sometimes, if either the
“ crime be moderate, or the signs of guilt not very great, instead of tor-
“ ture, what they call *territion*, and that either *verbal* or *real*, is decreed.
“ 5, that when the person accused is by torments or *territion* brought to
“ confession, that confession, after some days, is accounted ratified, with-
“ out torture taking place.”

Nemesis Carolina is the constitution of the emperor *Charles* the Vth. and
of the states of the Sacred *Roman* empire, containing and establishing the
laws in capital cases, or the criminal constitutions of public judgments,
declaring the duty of judges, assessors, counsellors, senators, and other
persons employed in capital judgments, and directing the proceedings
against the persons accused, made in the year 1532.

Among the reasons assigned for making this constitution, it is therein
declared, that thro’ the unjust sentences of unskilful, or crafty judges,
innocent persons were cast into prison, rashly subjected to tortures, and
even with greater boldness unjustly punished, and that the truly guilty,
by long delay fraudulently interposed, not without frustration of the
accusers, and crafty elusion, escaped just condemnation.

Criminal appearances [*indicia*] preceding the use of torture are ex-
plained in the 19th chapter of this constitution, in these words. “ As
“ often as we shall hereafter mention *indicia*, we would have all persons
“ take notice that by us marks, signs, arguments, suspicions not light,
“ conjectures legally proved, assistances [*adminicula*] presumptions, and
“ things of that kind, are to be understood.”

The 58th chapter declares what method is to be observed in the use
of torture, as follows.

E

“ Torture

“ Torture is a horrible thing, very hurtful to the bodies of men, and
 “ sometimes deadly ; and to which even death is almost preferable, be-
 “ cause pain, as the player saith, compelleth even the innocent to lye
 “ [*quod dolor, ut ait Mimus, etiam innocentes mentiri cogat*] [g] and a
 “ good and pious man would rather dye an hundred times than lye once,
 “ and by lying sin, and by sinning offend God. And so much the
 “ more worthy of commiseration is the condition of judges, whose igno-
 “ rance for the most part is the calamity of the innocent, agreeable to
 “ which that most holy prelate and doctor of the old church *Aurelius*
 “ *Augustine* hath many things, in that great work which he wrote of
 “ the city of God, and hath left for the perusal of pious posterity. For
 “ which reason more especially a measure in torture (which we justly
 “ believe to have been the invention of *Tarquin* the proud, or *Mezentius*,
 “ or *Phalaris*, or of some other more cruel tyrant, tho’ nothing hindreth
 “ us from using it rightly, and on proper occasion) ought to be observed
 “ by the judge ; who shall diligently endeavour to attemper the torments
 “ in proportion to the age, sex, and strength of the persons, and the na-
 “ ture of the case, using them more frequently, or more sparingly, more
 “ gently or intently ; because the tortured persons ought to remain safe,
 “ in order to their discharge as innocent, or punishment as guilty.
 “ Neither let him give credit to what the accused utter in the midst of
 “ pain ; but only to what they shall declare and confess when immedi-
 “ ately taken from the torture, and let it be taken in writing, as being
 “ what will most contribute to the investigation of truth.” [h].

[g] This is said in the following verse, *Etiam innocentes cogat mentiri dolor*, of *Publius Syrus*, a Syrian mimographer, who was in so great esteem with *Julius Cæsar*, that he preferred him to *Laberius*, the chief of the Roman authors in compositions of this nature.

[h] An intelligent judge for a prince on the continent informs me that this constitution continues to be the great law of the empire in capital cases, saving some alterations made by the king of *Prussia* ; that being chiefly collected from the civil law it was received in *France* and *Spain*, as subsidiary to their laws ; and that it was also received, and continues now in use in *Denmark* : but that torture, with respect both to the innocent and the guilty, having been found to be an uncertain mean of discovering the truth, his *Danish* majesty has restrained his judges from making use of it without special directions. And altho’ the *Russians* were so lately civilized ; yet, according to my intelligence received from a sensible *Russian* officer, they have, to their honour, so far improved the course of their judicial proceedings as to exclude the use of torture, upon full conviction that many innocent persons had for the sake of immediate ease confessed themselves guilty.

HEINECCIUS. "Collection of *Roman Antiquities* illustrating jurisprudence." Book IV. Tit. 18. § 25.

"As therefore upon the first pleading all things were to be confirmed by the accuser by testimonies, and those proofs were divided into examinations by torture, witnesses, and written depositions [*quaestiones, testes, et tabulas*] something, I think, is to be observed of each from antiquities. *Quaestiones* were the testimonies of servants, expressed by the force of torments. For the accuser was wont, as soon as the judges with the prætor were seated, to require the servants of the person accused to be put to the torture. But servants might not be interrogated touching matters affecting the life of their master, unless in the cause of incest and conspiracy, and afterwards even in the cause of tributes; in other crimes the safety of masters was not to be put in the power of servants. Sometimes the servants of other persons were required for torture; but only singly, and with the masters permission: but he was not otherwise obliged to permit it than if the accuser gave security to pay the price of them if they expired in the torture, and the estimation of the damage if they were made worse; the servants therefore required to be tortured being bound to the rack, in the presence of the advocates, were so stretched that the poor wretches hung as it were from a cross, and the juncture of their bones was loosened [*ipsaque compages ossium illis divelleretur.*] Then moreover, to encrease the pain, sometimes were applied heated plates, iron pincers, and other torments of that sort, largely described by *Sigonius* and others. The examination by torture being taken, and the confession of the servants reduced into writing, that writing was kept sealed till produced in judgment."

This author having, in the 335th section of his 3d book of the "Elements of the *Germanic Law Ancient and Modern*," observed that the custom of excruciating accused persons by torments seems to have fallen gradually into disuse in the middle age; for no footsteps thereof is to be found in the *Saxon* or *Suevic* law, each nation seeming to be content with the more common purgations, which they judged to be a more certain mean of investigating the truth than dire questions; whence *Schilter*

imagined that torture at length crept into the courts of the *Germans* with the *Roman* law; on the contrary *Thomasius* and *Gribner* thought it was introduced long before that time by the clergy raging against heretics, &c. In a note hereon he says that “the laws of other nations who have more sacredly preserved the rights and customs of their country are at this day unacquainted with torments.” adding, “*Britain* truly is a stranger to this butchery.”

To the collections of this learned author I shall add the following.

Digest Book XLVIII. Tit. 18. Of examinations by Torture.

§ 9. *Marcian*. B. 2. Of public judgments.

“The emperor *Pius*, in his rescript, said that servants might be tortured in a pecuniary cause, if the truth cannot otherwise be found out; which is also appointed by other rescripts: but torture is not readily to be used in a pecuniary matter; but if the truth cannot otherwise be obtained than by torments, examination by torture may be used; as also the emperor *Severus* said in his rescript; examination by torture may therefore be used upon the servants of others, if the matter require it.”

Tacitus being on the 25th of Sept. 275 chosen emperor by the senate; as *Vopiscus* relates, he thereupon made an oration to them, wherein he declared that “he would do all things agreeably to their opinion and authority, and that it therefore rested with them to command and establish those things which should appear worthy of themselves, worthy of a modest army, and worthy of the *Roman* people;” and in the same oration he provided that servants should not be questioned in matters touching the life of their masters, not even in the cause of treason. I have not seen any mention of this constitution in the codes of the *civil* law, and am unable to say how long it continued in force; but it is certain that in the next century *Constantine* ordained that no privilege of dignity should exempt any persons accused from torture in cases of treason.

Innumerable persons civil and military, by reason of their dignity, employment or otherwise, were generally exempt from torture, except in cases

cases of treason, or other nefarious crimes; but in the reign of *Valentinian* the elder, a criminal cause pending at *Rome*, respecting an attempt to poison two considerable persons, was, by reason of the indisposition of the city prefect, committed to the cognizance of *Maximinus*, prefect of the corn. He being by nature extremely cruel, and giving ear to men of infamous lives, who named some noble persons, as having employed their dependents or others dextrous in the art of destruction, maliciously represented to the emperor that the pernicious practices of many persons at *Rome* could not be discovered or punished without using the sharper punishments. Upon this the enraged emperor, by an order, appointed that in such cases, which he blended with treason, all those whom the justice of the old law, and the constitutions of the deceased emperors, exempted from the cruel examination by torture should be subject to it when the matter so required; and encreasing the dangers he associated with *Maximinus*, appointed to act at *Rome* in the place of the prefects, a military man of low degree, and of the most savage disposition. This similar colleague, with the amplitude of his new powers, encreased the innate propensity of *Maximinus* to do mischief; and now, to the great terror of the whole city, multiplied slaughters ensued, with such cruelties, that, according to *Ammianus Marcellinus*, neither the diversity of their nature, nor their number could be comprehended. Among the sufferers one senator fell. In this state of distress and danger, by decree of the nobility, legates were sent, to entreat the emperor that punishments might not be greater than the offences, nor any senator be exposed to torments in an unusual and illicit manner; who being admitted to an audience, on their relating the preceding facts, the emperor denied that he had given the order supposed, and with some emotion said that he was reproached; upon which the questor *Eupraxius* modestly convinced him of his mistake; and by this liberty [taken by the officer whose duty it was to endite the laws] the cruel order was emended, which *Ammianus* says surpassed all examples of severity. Here the advocates for the absolute power of princes may behold some of its noblest fruit, an emperor suddenly subjecting the inhabitants of *Rome*, the mistress of the world, with the members of that senate by whose wisdom it was conquered, to tortures and death, at the discretion, that is, at the pleasure

pleasure of two most impious and cruel men, and doing this on the bare representation of one of them.

Valentinian dying shortly after this transaction, in the next year, 377, upon the petition of the *Roman* senate, *Gratian* then alone governing the western empire issued the following edict.

“ Impp. Valens, GRATIANUS, & Valentinianus AAA.

“ ad Gracchum P. P.”

“ Severam indagationem per tormenta quærendi à Senatorio nomine
“ submovemus. Dat. prid. non. Januar. Trev. Gratiano A. iv. & Mero-
“ baudo. Coss. [377.]”

“ The august emperours Valens, GRATIAN’, and Valentinian,
“ to Gracchus Prætorian Prefect.”

“ We exempt all senators from the severe examination by torture.
“ Given the 4th day of January at Triers. The august Gratian the 4th
“ time, and Merobaudus being consuls [377.]”

ULRIC HUBER, in his prelections of the *Roman* and modern law. part vii. Of the Pandects B. 48. Tit. 18. Of examination by Torture.

This author, who favours this practice under certain regulations, says,
“ When the accused person taken out of bonds pleads his cause it some
“ times happens that his examination is appointed to be taken under tor-
“ ments, concerning which it is in the first place questioned whether it
“ be just to torture persons not convicted; and it is matter of great
“ wonder that almost all nations, except the *Hebrews*, should have held
“ the affirmative, the more part of learned men, not only divines, but
“ also some lawyers, holding the negative, and among them both my
“ preceptors, *Anthony Mattheus* and *Wissenback*; and some to avoid this
“ necessity have even refused the most ample dignities of judges, among
“ whom was the illustrious *Henry Schotan* — and that we may have
“ less need to answer in order the arguments of the opponents, which
“ are very many and pregnant, we shall say that necessity alone defend-

“eth the use of examination by torments, because otherwise the im-
 “punity of crimes would be intolerable to a common-wealth, without
 “which it would not have been received by so great consent of the most
 “civilized nations. To this add the agreement of the city, by which
 “the laws made in every common-wealth seem to be approved by
 “common consent of the citizens.”

This author, sect. 10, sets forth the proceedings in case of confession made upon torture, and subsequent revocation, as follows. “If the
 “accused person says in torments that he will confess, he is delivered
 “from the instruments of pain, and his confession, made sitting, to the
 “several articles of the fact, written in order, and credit is given to it,
 “if there be nothing found in it suspicious, or having no appearance of
 “truth. The custom generally used is to read over the confession about
 “twenty four hours after to the accused person, and to require its rati-
 “fication, as it is called. This institution is neither known to the *civil*
 “law nor observed in our court [i]; but if the party continue silent it is
 “accounted for consent; and if he revoke the confession, he is again to
 “be subjected to torments, and if he revoke the confession then again
 “made, he may be tortured the third time; then to be acquitted.”

Courts of justice are the proper sanctuary of the innocent, and this practice, which, under the pretence of doing justice, hath so often subjected them to such grievous severities, is so remote from every thing truly divine, that, in my opinion, its continuance under the mild dispensation of the gospel in so many *Christian* states is no less the subject of admiration than concern, as they could not avoid perceiving that it was not permitted by the less perfect law of *Moses*; more especially considering how long since *Christianity* had so far mollified and reformed the dispositions and customs of its professors, that they ceased to enslave each other when made captives in war.

Unfortunately the present does not secure the future exemption of a people from examination under torments. The *Hebrews* while they enjoyed the full benefit of the law of *Moses*, had not, I presume, the least apprehension of any future sufferings of this kind; and yet they were

[i] The supreme court of *Friezeland*, of which this author was a member.

subjected to this cruel proceeding in the extremest manner under *Herod the Great*, who scrupled no violation of the sacred law, or the ancient institutions of his kingdom. On the dissensions in his family this king, *Josephus* [k] says, in the first place examined by torture all whom he thought to be faithful to [his son] *Alexander*, whether they knew of any of his attempts against him; but they died without having any thing to say to that matter. After this, through the instigation of his son *Antipater*, he put great numbers to the torture, to discover what attempts were still concealed; and only gaining from one of them an account of matters that were either of no great moment, or improbable, and being very solicitous to obtain better evidence of his sons wickedness, that he might not appear to have imprisoned him too rashly, he tortured the principal of *Alexanders* friends, and put not a few of them to death, without getting any of the things out of them which he suspected.

Waving farther particulars, it may suffice to say that the cruelty and wickedness of this tyrants court brought the whole into such a calamitous state, that, having forsaken the law, which was the common safety, there was no room for defence or refutation in order to the discovery of the truth; but all were at random doomed to destruction; so that some lamented those that were in prison; some those that were put to death, and others lamented that they were in expectation of the same miseries; and a melancholy solitude rendered the kingdom deformed, and quite the reverse to that happy state it was formerly in.

“MONTAIGNE [l] has the following passage on this subject. “Torture is a dangerous invention, and seems rather a trial of patience than of truth; and he that can bear, and he that cannot bear it, equally conceals the truth; for why shall pain make me rather confess what is, than force me to say what is not? and, on the contrary, if he that has not committed the fact of which he is accused is patient enough to suffer these torments, why will not he be so that has, when so great a reward as life is proposed to him? I believe that the foundation of this invention was owing to the consideration of the effort of conscience; for to the guilty it seems to aid the torture to make him confess his

[k] *Antiq.* Book xvi. chap. 8.

[l] *Essays*, Book ii. chap. 5.

“crime,

“ crime, and that it weakens him; and on the other hand to fortify the
 “ innocent against it. To speak the truth, it is a method full of uncer-
 “ tainty and danger; for what would not a man do, or say, to avoid
 “ such intolerable pains? *Etiam innocentes cogit mentiri dolor.* Publ. Syr.
 “ vers. 191. Whence it happens that he whom the judge has tortured
 “ to prevent his dying innocent causeth him to dye both innocent and
 “ tortured. Thousands and thousands have loaded themselves with false
 “ confessions, among whom I place *Philotas*, considering the circum-
 “ stances of *Alexanders* persecution against him, and the manner of his
 “ torture. But however, say they, it is the least evil that human weak-
 “ nefs could invent; very inhuman however, and, in my opinion, very use-
 “ less. Several nations, less barbarous in that respect than the *Greeks* or
 “ *Romans* who called them so, held it horrible and cruel to torment and
 “ tear a man in pieces for a crime of which you are still in doubt; what
 “ can it be but the effect of your ignorance? are you not unjust, who
 “ rather than put him to death unjustly torture him worse? Let it be
 “ so; see how often he had rather dye without a cause than to undergo
 “ this scrutiny, which is more painful than the punishment, and often
 “ by its severity antedates both the punishment and execution.”

GROTIUS, in one of his letters, says, “ That there are numberless
 “ examples of people who have been put to death unjustly, upon a
 “ confession extorted from them by the rack;” adding, “ that he does not
 “ wonder that there have been grave persons of opinion that *Christians*
 “ ought not to make use of torments, to effect confession of crimes,
 “ since it is certain there is nothing like it in the law of *Moses*; that in
 “ *England* they live in as great security as elsewhere, tho’ examination
 “ by torture is not used there; and that while *Rome* preserved her liberty,
 “ no citizens could be put to the torture.” — *Augustus* violated the
 right of exemption of the *Roman* citizens from torture by this detestable
 proceeding. According to the faithful *Suetonius*, suspecting that *Q.*
Gallius the prætor, who when saluting him held double writing-tables
 under his robe, hid a sword, nor presuming immediately to search, lest
 a different thing should be found, a little after, being dragged by centu-
 rions and soldiers from the tribunal, he tortured him in a servile manner,
 and confessing nothing, ordered him to be put to death, having first dug

out his eyes with his own hand: of whom nevertheless he writes that he would have insnared him by petitioning a conference, and that being by his order taken into custody, and afterwards discharged, being interdicted the city, he had perished by shipwrack, or by robbers.

Lord *Coke*, in the 2d chapter of his 3d Institute, shewing how prisoners committed for treason, or any other offence, ought to be demeaned in prison, cites, *Bracton*, *Britton*, *Fleta*, and the *Mirrour*, to prove that they are to be safely kept, not punished, nor constrained to answer but at their free will, nor put to any pain before they be attainted, after which he writes thus.

“ Hereupon two questions do arise, when or by whom the rack or brake in the tower was brought in.”

Rot. Par.
26 H. VI.

“ To the first, *John Holland* earl of *Huntingdon*, was by king *Hen.*

Rot. Par.
28 H. VI.
nu. 30.

“ VI. created duke of *Exeter*, and anno 26 *Hen.* VI. the king granted

“ to him the office of the constableship of the tower: he and *William*

“ *de la Poole* duke of *Suffolk*, and others, intended to have brought in

“ the *civil* laws. For a beginning whereof the duke of *Exeter*, being

“ constable of the tower, first brought into the tower the rack or brake,

“ allowed in many cases by the *civil* law: and thereupon the rack is

“ called the duke of *Exeters* daughter, because he first brought it thither.”

Hollinshed
pag. 670,
&c.
Inno-
centem co-
git mentiri
dolor.
Fortescue
ca. 22.
fol. 24.

“ To the second upon this occasion, Sir *John Fortescue*, chief justice

“ of *England*, wrote his book in commendation of the laws of *England*,

“ and therein preferreth the same for the government of this country

“ before the *civil* law; and particularly that all tortures and torments of

“ parties accused were directly against the common laws of *England*,

“ and sheweth the inconvenience thereof by fearful example, to whom

“ I refer you, being worthy your reading. So as there is no law to

“ warrant tortures in this land, nor can they be justified by any prescrip-

“ tion, being so lately brought in.”

“ And the poet in describing the iniquity of *Radamanthus*, that cruel

“ judge of hell, saith,”

Virgil,

“ *Castigatque, auditque dolos, subigitque fateri.*”

“ First he punished before he heard, and when he had heard his denial,

“ he compelled the party accused by torture to confess it. But far other-

“ wise doth Almighty God proceed *postquam reus diffamatus est.* 1. *Vocat.*

Luke xvi.
1, 2. &c.
John vii.
51, Nun-

“ 2. *In-*

“ 2. *Interrogat.* 3. *Judicat.* To conclude this point, it is against
 “ *Magna Carta*, cap. 29. *Nullus liber homo, &c. aliquo modo destruatur,*
 “ *nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium*
 “ *parium suorum, aut per legem terræ.* And accordingly all the said
 “ ancient authors are against any pain or torment to be put or inflicted
 “ upon the prisoner before attainder, nor after attainder, but according to
 “ the judgment. And there is no one opinion in our books, or judicial
 “ record (that we have seen and remember) for the maintenance of
 “ tortures or torments, &c.”

quid lex
 nostra ju-
 dicat ho-
 minum
 nisi prius
 audierit ab
 ipso ?

The 27th Title of the second part of the aforementioned treatise of
 Sir George Mackenzie is as follows.

“ Of Torture.”

- “ 1. By whom can torture be inflicted in our law.
- “ 2. Torture purges all presumptions.
- “ 3. Whether may persons who are condemned, be thereafter tortured.
- “ 4. Who are exeemed from torture.
- “ 5. How should such be punished who torture unjustly.

I. “ TORTURE is seldom used with us, because some obstinate persons
 “ do oft times deny truth, whilst others who are frail and timorous con-
 “ fess for fear what is not true. And it is competent to none, but to the
 “ council or justices, to use torture in any case ; and therefore they found
 “ that Sir *Wm. Ballenden*, as a captain, could not torture, tho’ it was
 “ alleged that this was necessary sometimes for knowing the motions of
 “ the enemy, and might be necessary and allowed in some cases to soldiers
 “ for the good of the common-wealth. And the council are so tender
 “ in torture, that tho’ many presumptions were adduced against *Giles*
 “ *Thyre* Englishman, suspected of murder and adultery, they refused to
 “ torture him, albeit it was prest zealously by his Majestys advocate.”

II. “ IT is a brocard amongst the doctors, that he who offers to
 “ abide the torture purges all other presumptions which can be ad-
 “ duced against him ; and yet *Alexander Kennedy* being pursued for forg-
 “ ing some bonds, and nothing being adduced for proving the crimes,
 “ save presumptions, offered to abide the torture ; but this was refused.”

“ TORTURE likewise being adduced purges all former presumptions which preceeded the torture, if the person tortured deny what was objected against him : but yet he may be put to the knowledge of an inquest upon new presumptions, as was found after a learned debate in the case of *Toshoek*, who was tortured for the alledged burning the house of *Frendraught*, August 1632 : for it was alledged, that torture is intended for bringing the verity to light, and as he had been condemned if he had confessed, so he should be assolied when he denies, else no man would endure the torture, if they were not persuaded that upon denial they should be cleared, but would confess, and not endure so much torment unnecessarily ; so that the inquisition would be the occasion of much sin, and make men die with a lie in their mouth : and therefore torture is called *probatio ultima*, *vid. Clar. quæst. 64.* Yet *Spot*, *Maxwel* of *Garrery*, and others, were condemned after torture, upon other probation than was deduced before the torture.”

III. “ I remember it was debated in council, *anno 1666*, if the west-country men who were condemned for treason, might after sentence be tortured, for clearing who were their complices ; and it was found that they could not, *nam post condemnationem judices functi sunt officio* ; yet all lawyers are of opinion, that even after sentence, criminals may be tortured for knowing who were the complices.”

IV. “ ONE of the privileges of minors is, that they cannot be subjected to torture, lest the tenderness both of their age and judgment make them fail, ὁ ἡττων τῶν δεκατεσσάρων ἐτῶν ἔχ' ὑφίσταται ἐμβάσανον ζήτησιν, *Eclog. de quæst. cap. 9. ad.* Yet *L. 5. ff. de quæst.* Judges are discharged only to torture such as are under fourteen. Persons very old were not to be tortured, for the same reason. *L. 3. ff. ad S. C. Sillan.* which was by some extended to women, sick persons, and such as had been eminent in any nation for learning or other arts ; but all this is arbitrary with us.”

V. “ THESE who torture, if the person tortured die, are punishable as murderers ; but tho' they die not, yet by the civil law they were punished *deportatione in insulam*, or by banishment ; and with us they are punished according to the quality of the crime.”

The

The union of the kingdoms of *England* and *Scotland* was attended, among others, with this happy circumstance, the principal or greater kingdom, which of course would, and of right ought to, have its proportionate just influence over the whole, enjoyed the more mild and excellent constitution, the benefits whereof would probably be by degrees communicated to the other kingdom on their union. Accordingly we find that by an act of parliament for improving the union of the two kingdoms, passed in the 7th year of the reign of queen *Anne*, it was enacted, "that from and after the first day of July 1709 no person accused of any capital offence or other crime in *Scotland* should suffer, "or be subject or liable to any torture," to which the *British* subjects residing in that part of the united kingdom were liable from the first day of May 1707, when the union took place, in consequence of the provision thereby made for continuing the laws of *Scotland* in force.

In order to complete the enquiry into the *Imperial* laws against libels we shall in the next place consider those laws and proceedings of the emperours which respected such writings, words and actions as reproached them, or those who were arranged with them, which being blended with the greatest crimes against the state were deemed violations of majesty, or treason. *Tacitus* says, "this law in former times had the same name; but different offences were the subjects of it, as betraying an army, raising seditions, or lessening the majesty of the *Roman* people by the male administration of their affairs; actions were punishable, but words were free." and that *Augustus* [whose conduct was well adapted to fix the fetters on a free people] "was the first who treated libels as offences against this law, being provoked by the licentiousness of *Cassius Severus*, who by his petulant writings had defamed illustrious persons of both sexes," and artfully taking occasion thence, as some suppose, to preserve his own character free from those censorious writings for which he had given so great cause. This extension of the law of violated majesty was accompanied with the most dangerous provision; for to encrease the number of the accused even infamous persons, and servants, with freed men, were admitted to accuse; but the chief offenders only against this law were put to death, the others being punished with less severity. Afterwards, as *Tacitus* relates, this law was revived.

revived by *Tiberius*. *Pompeius Macer* the prætor consulting him whether process should be granted upon it, he answered that "the laws must be executed." He was likewise exasperated by satyrical verses of unknown authors, reflecting on his cruelty, pride, and want of affection to his mother. This dark tyrant for some time dissembled his cruel disposition so far, that, according to *Suetonius*, "unmoved by reproaches, evil reports, and lampoons, he would thereupon say, that in a free city the mind and tongue ought to be free." Yet after some time, the malignity of his nature breaking thro' all disguise, he not only revived the severe law of *Augustus*; but extended it so far that these things were treated as capital offences; to have killed a slave, or changed a garment, near a statue of *Augustus*, or to have carried that emperours image impressed on a coin or ring into an indecent or infamous place, or to have injured any expression or action of his by any misconstruction. The punishment appointed by *Augustus* did not satisfy his cruel successors; for *Paul* the lawyer, in his received sentences, writes that in his time the lower sort were cast to beasts, or burnt alive; the better sort were capitally punished. Death itself did not exempt persons from accusation, and confiscation of their estates; and the emperours *Arcadius* and *Honorius*, influenced by their tyrannic ministers *Ruffinus* and *Eutropius*, whose vices were the subjects of *Claudians* invectives; but the force of whose language, without disparaging the poet, was far from being equal to their enormities, extended the severities of the law of violated majesty still farther; so that the sons of persons convicted were excluded from the inheritance of their mothers, and of all their relations, and disabled to take any thing by will from strangers, or to aspire to any honours; so that paternal infamy perpetually accompanying their poverty their life was a burthen.

J. F. Gronovius has the following note, applauded by others, on these words of *Tacitus*; *facta arguebantur, dicta impunè erant*, which we have rendered, actions were punishable; but words were free. "These words are most true, which the whole title in the *Digest* on the *Julian* law of Majesty teacheth and demonstrateth, that even after so many ages, so many tyrants did not dare openly to enact that words should be punishable, tho' they suffered the law to be wrested by interpretation to that effect."

It

It is impossible, in my opinion, to ascertain the several portions of time wherein the reproaches of the prince by words or writing were and were not considered and prosecuted as treason. Grave authors have not scrupled to say that many of the *Roman* emperours were not men, but wild beasts in human shape; and if through the goodness of one or several succeeding emperours this wrested law lay quiet, yet, like a sleeping lion, it was ready to be roused for destruction, as soon as the caprice and ferocity of a brutal successor should dictate; and one instance of Imperial butchery frequently gave occasion for other severities. Mankind are so formed that they cannot in some cases forbear complaints and lamentations; and yet *Arnobius*, an *African* writer in the 3d. century observes that the *Romans* held those to be guilty of treason who in plaintive accents uttered any thing amiss of their kings [*m*], who sometimes interdicted even near relations to bewail those that were capitally punished.

After beholding so many scenes of horror and distress we shall at length be relieved by the sight of a few objects of a different nature. *Xiphilin* has transmitted to posterity the sense which the most excellent *Titus* had of the censures of his conduct, in his own remarkable words. After giving instances of the emperours great clemency this author relates that judgments of impiety he neither prosecuted himself nor suffered others, saying, “ I can indeed neither be injured nor aspersed, for I neither do any thing “ worthy of reprehension, nor regard what is spoken falsely.”

Tacitus, after complaining that historical truth was much impaired and corrupted by the establishment of *Imperial* power, rejoices in the rare felicity of the times wherein he wrote, in which *it was lawful for every one to think what they would, and to say what they thought*. Such was the freedom enjoyed under the illustrious *Trajan*, who enlarging the empire in the East and the West, had a more extensive command than any other *Roman*, and whose mind was equal to this wide dominion, with all its cares. *Aurelius Victor*, an author of the 4th. century, probably an *African*, who by his sole merit from low estate was raised by degrees to the consular dignity, in his account of this emperour, informs us that his administration of the common-wealth was such, that the most consummate writers with their utmost efforts could scarce describe its excellence;

[*m*] *Majestatis sunt apud vos rei, qui de vestris secus obmurmuraverint aliquid regibus.*
Adv. Gentes. lib. iv.

and, among other things, that justice and divine and human rights were the subjects of his wise counsels and special protection.

The codes of the *civil* law make no mention of these regulations of two emperours whose amiable deportment virtues and abilities were the delight, admiration and security of the *Roman* world.

We shall in the next place set forth a notable edict of *Theodosius* the Great, of which *Francis Baldwin*, a lawyer in the 16th. century, famous in *France* and *Germany* for his general learning, as well as knowledge in jurisprudence, gives this historical account, in the 2d. book of his commentary on the laws of *Constantine* the Great. “ Concerning the crime of violated
“ majesty, respecting which other princes, being severe judges in their
“ own cause, made so many laws, we have no law of *Constantine*; but
“ he hath left us an illustrious example of his singular clemency herein,
“ which is most worthy of our remembrance. It is, to my great surprize,
“ indeed omitted by those who have in other respects heretofore written
“ such long commentaries of *Constantine*, either thro’ negligence or forgetfulness: but in reading the sermons of *Chrysostome* preached to the
“ people of *Antioch*, I luckily met with that remarkable passage whence I
“ have taken this story. Certain seditious or petulant persons had thrown
“ stones at a statue of *Constantine*. They were accused. The accusers,
“ the more to inflame the prince to revenge, magnified the atrocious injury by the most atrocious words, declaring with vehemence that this
“ violation of majesty was no less flagitious than if the living face of the
“ emperour himself had been stricken and bruised with stones. Hereupon
“ *Constantine* feeling his face with his hand, and gently smiling, pleasantly
“ answered that he felt no wound from that stoning. By which answer
“ he not only repulled those accusers, but taught other princes, no less
“ than if he had made a law, to be placable in their own cause. Also
“ when afterwards certain persons at *Antioch* had thrown down the
“ statues of the empress *Placidia*, and *Theodosius*, being incensed by such
“ an injury done to his wife, intended to destroy the city [*n*], *Flavianus*,

[*n*] *Antioch*, the capital of *Syria*, according to *Chrysostome*, was at this time the first city of the world, whose inhabitants, after many of them had suffered for the sedition wherein the Imperial statues were overthrown, by fire, by being cast to wild beasts, and by the military sword, which spared none by reason of their tender age, continued in the utmost dread of extirpation.

“ bishop of *Antioch* being sent to appease him, particularly set before him
 “ what I have related of *Constantine*, and so pacified *Theodosius* by that
 “ example, that he even published a law by which he adjudged those to
 “ be pardoned who should have reproached the emperor.” Which law
 is as follows.

IX. Cod. Theodos. Tit. IV.

“ THEODOSII M. *constitutio, de MALEDICTIS in principem,*
ejusve Tempora jactatis.”

“ Imppp. THEOD. Arcad. & Honor. A. A. A. Rufino P. P.”

“ S I quis, modestiæ nescius, & pudoris ignarus, improbo petulantique
 “ maledicto nomina nostra crediderit laceffenda, ac temulentiâ turbulen-
 “ tus obtreçtator temporum fuerit, eum pœnæ nolumus subjugari, neque
 “ durum aliquid nec asperum sustinere; quoniam, si id ex levitate proces-
 “ ferit contemnendum est: si ex infaniâ, miseratione dignissimum: si ab in-
 “ juriâ, remittendum. Unde integris omnibus, ad nostram scientiam
 “ referatur, ut ex personis hominum dicta pensemus, & utrum præter-
 “ mitti, an exquiri debeat, censeamus. Dat. V. Id. Aug. Constantinop.
 “ Theod. A. III. & Abundantio V. C. Cos. [393.]”

“ A constitution of THEODOSIUS the Great, respecting opprobrious
 “ words used against the prince, or his times.”

“ The Augt. Emprs. THEODOSIUS, Arcadius and Honorius,
 “ to Rufinus. Prætorian Prefect.”

“ If any person, void of modesty and shame, shall think our name is to
 “ be abused by insolent reproach, and be wantonly a turbulent disparager

Their present condition was deplorable, but if the intended order of excision had been issued
 as suddenly as the order of *Valentinian* respecting the inhabitants of *Rome* this noble city must
 have been utterly destroyed, and its numerous inhabitants subjected to calamities exceeding
 all description.

“ of the times, we will not have him subjected to punishment, nor sustain
 “ any hardship or severity, because if it hath proceeded from levity it is to
 “ be contemned; if from insanity, most worthy of compassion; if from in-
 “ jury, it is to be pardoned. Wherefore let the whole be referred to our cog-
 “ nizance, that from the quality of the men we may consider the expres-
 “ sions, and judge whether they ought to be pardoned, or examined into.
 “ Given the 28th. of July, at Constantinople. The August Theodosius
 “ the 3d. time, and the most noble Abundantius being consuls. [393.]”

“ This constitution was adopted by *Justinian*, and makes part of his
 “ code, standing single there, and in the *Theodosian* code: but although
 “ clemency is allowed to be one of the brightest jewels in the royal dia-
 “ dem, yet I do not perceive that any of the *European* princes, who have
 “ so far received the *civil* law of the *Romans* for their government, have
 “ admitted this constitution.

For the farther illustration of the spirit of the *Imperial* laws it may be observed that they were unfavourable to religious as well as civil liberty. The *Theodosian* code contains sixty six constitutions against heretics; one of them defines heretics to be those, *qui vel levi argumento a judicio Catholicæ religionis & tramite detecti fuerint deviare*; “ who shall be discovered
 “ to deviate from the judgment and path of the Catholic religion, even
 “ in a slight article,” according to *Gothofreds* clear sense of this definition. These constitutions imposed on various heretics the following respective punishments, to wit, The doctors teaching their faith were to be severely fined; to be expelled the cities, and banished. Sometimes all their effects were to be confiscated; sometimes they were to be fined ten pounds of gold, together with the managers of their affairs, and those who supplied them with places to meet in; if poor, that fine was to be levied on the common body of the clergy, or taken from the offerings: sometimes they were to be beaten with lead, and, to dissolve their society, to be sent singly into separate countries. The lands, houses, dwellings, and places (which usually belonged to great men) in which the heretics met and celebrated their rights, with the owners knowledge, were either confiscated, or given to the church and clergy; also tenants, stewards, agents, and countrymen suffering these assemblies were subjected to various punishments; sometimes to death. All catholics were empowered to disturb the meetings of heretics. Those who partook, and were privy to
 their

their superstition were punished in like manner with the authors. Sometimes heretics were subjected to infamy by public edicts; odious names were given to them; they were not permitted to partake of the laws and customs of their country in common with others. The right of disposing of their estates by will to each other, and of receiving legacies, was taken away, and likewise the right of contracting, buying and selling. Some of them were sometimes commanded to be driven from their habitations, cities and provinces; from all places; from the society of honest persons, and from the communion of saints. There was no standing law for punishing heretics in general with extreme punishment; but in certain cases it was ordained that they should be put to death; and sometimes those who revived noxious books were commanded to be capitally punished. To these severities were heretics subjected, with various others respecting them and their families.

Here we have the origin of those severe laws and proceedings which for so many ages have taken place among *christians*, in consequence of their differing in opinion from each other upon religious subjects, transgressing the equal and perpetual law of doing that unto others which they would have done to themselves, whereby such manifold distress and grievous destruction have so often deformed the *Christian* world; and a view of the preceding matters, besides giving us other information, will enable us to judge in some measure of the propriety and justice of those exuberant praises which several *English* authors have indiscriminately bestowed on the *civil* law; one of whom [o], without citing others, says, “ the *civile* “ law is the law which the old *Romans* used, and is for the great wisdom “ and equity thereof, at this day, as it were the common law of all well “ governed nations, a very few only excepted. And certainly, albeit “ fundry other nations by the light of nature have many rules and max- “ imes in the *civile* law; yet, if all the constitutions, customs, and laws of “ all other people and countries were put together, (I except none, save “ the laws of the *Hebrews*, which came immediately from God) they are “ not comparable to the law of the *Romans*, neither in wisdom nor equity, “ neither in gravity nor in sufficiency.”

[o] Dr. *Ridley*, in his “ View of the *Civile* and Ecclesiastical Law.

Having stated the *Imperial* laws and proceedings touching libels, we shall now consider their treatment at particular times in *England*—Lord *Coke*, in his 3d. Institute, has a chapter in these words, “Of Libels and Libellers. What a libel is, how many kinds of libels there be, who are to be punished for the same, and in what manner, you may read in my reports, viz. lib. 5. fo. 124, 125. lib. 9. fo. 59. To these you may add two notable records. By the one it appeareth that *Adam de Ravensworth* was indicted in the kings bench for the making of a libel in writing in the *French* tongue, against *Richard of Snowshall*, calling him therein, *Roy de raveners*, &c. Whereupon he being arraigned pleaded thereunto not guilty, and was found guilty, as by the record appeareth. So as a libeller or a publisher of a libel committeth a public offence, and may be indicted therefore at the common law.”

Mich. 10.
E. 3. co-
ram Rege.
Rot. 92. E-
borum.

“*John de Northampton* an attorney of the kings bench, wrote a letter to *John Ferrers*, one of the kings counsel, that neither Sir *William Scot*, chief justice, nor his fellows the kings justices, nor their clerks, any great thing would do by the commandment of our lord the king, nor of queen *Philip*, in that place, more than of any other of the realm; which said *John* being called, confessed the said letter by him to be written with his own proper hand. *Judicium curiæ. Et quia prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de concilio regis, quæ litera continet in se nullam veritatem: prætextu cujus dominus rex erga curiam & justiciarios suos hic in casu habere posset indignationem, quod esset in scandalum justic' & curiæ. Ideo dictus Johannes committitur Marefc', & postea invenit 6 manucaptos pro bono gestu.* Judgment of the court. “And because the aforesaid *John* hath acknowledged the said letter by him written to *Robert de Ferrers*, who is of the kings counsel, which letter containeth in it no truth; by means whereof the lord the king towards the court and justices in this case might have indignation, which would be to the scandal of the justices and the court. Therefore the said *John* is committed to the mareschal, and afterwards he found six sureties for his good behaviour.”

Mich. 18.
E. 3. coram
Rege. Rot.
151. Libel-
lum.

The cases referred to by lord *Coke*, and which, according to his declared sense of them, formed a body of laws respecting libels, stand thus in his reports.

“The

“ *The case de Libellis famosis; or of Scandalous Libels.*”

“ Pasch. 3 Jacobi 1.”

“ In the case of L. P. in the *Star-Chamber* this term, against whom
 “ the attorney general proceeded *ore tenus* on his own confession, for com-
 “ posing and publishing an infamous libel in verse, by which *John arch-*
 “ bishop of *Canterbury* (who was a prelate of singular piety, gravity
 “ and learning, now dead) by descriptions and circumlocutions, and not
 “ in express terms; and *Richard* bishop of *Canterbury* who now
 “ is, were traduced and scandalized: In which these points were re-
 “ solved:

“ 1. Every libel (which is called *famosus libellus, seu infamatoria scriptura,*)
 “ is made either against a private man, or against a magistrate or public
 “ person. If it be against a private man, it deserves a severe punishment;
 “ for altho’ the libel be made against one, yet it incites all those of the
 “ same family, kindred or society to revenge, and so tends *per consequens*
 “ to quarrels, and breach of the peace, and may be the cause of shedding
 “ of blood, and of great inconvenience: if it be against a magistrate, or
 “ other public person, it is a greater offence; for it concerns not only the
 “ breach of the peace, but also the scandal of government; for what
 “ greater scandal of government can there be than to have corrupt or
 “ wicked magistrates to be appointed and constituted by the king to
 “ govern his subjects under him? And greater imputation to the state
 “ cannot be than to suffer such corrupt men to sit in the sacred seat of
 “ justice, or to have any meddling in or concerning the administration of
 “ justice.

“ 2. Although the private man or magistrate be dead at the time of
 “ the making of the libel, yet it is punishable; for in the one case
 “ it stirs up others of the same family, blood, or society to revenge, and
 “ to break the peace, and in the other the libeller traduces and slanders
 “ the state and government, which dies not.

“ 3. A libeller (who is called *famosus defamator*) shall be punished either
 “ by indictment at the common law, or by bill, if he deny it, or *ore*
 “ *tenus* on his confession, in the *Star-chamber*, and according to the qua-

“ lity

“ lity of the offence he may be punished by fine or imprisonment ; and
 “ if the case be exorbitant, by pillory and loss of his ears.”

“ 4. It is not material whether the libel be true, or whether the party,
 “ against whom it is made, be of a good or ill fame ; for in a settled state
 “ of government the party grieved ought to complain for every injury
 “ done him in an ordinary course of law, and not by any means to re-
 “ venge himself, either by the odious course of libelling, or otherwise:
 “ he who kills a man with his sword in fight is a great offender, but he
 “ is a greater offender who poisons another ; for in the one case he, who
 “ is openly assaulted, may defend himself, and knows his adversary, and
 “ may endeavour to prevent it ; but poisoning may be done so secretly
 “ that none can defend himself against it, for which cause the offence is
 “ the more dangerous, because the offender cannot easily be known ; and
 “ of such nature is libelling, it is secret, and robs a man of his good
 “ name, which ought to be more precious to him than his life, & *diffi-*
 “ *cillimum est invenire authorem infamatoriae scripturae* ; and therefore, when
 “ the offender is known, he ought to be severely punished. Every infa-
 “ mous libel, *aut est in scriptis, aut sine scriptis* ; a scandalous libel *in*
 “ *scriptis* is, when an epigram, rhyme, or other writing is composed or
 “ published to the scandal or contumely of another. And such libel may
 “ be published, 1. *verbis aut cantilenis* ; as where it is maliciously repeated
 “ or sung in the presence of others. 2. *Traditione*, when the libel, or any
 “ copy of it, is delivered over to scandalize the party. *Famosus libellus*
 “ *sine scriptis* may be, 1, *picturis*, as to paint the party in any shamefull
 “ and ignominious manner. 2, *signis*, as to fix a gallows, or other re-
 “ proachful and ignominious signs at the partys door, or elsewhere. And
 “ it was resolved, *Mich. 43 and 44 Eliz.* in the *Star-chamber* in *Halli-*
 “ *woods* case, That if one finds a libel (and would keep himself out of
 “ danger) if it be composed against a private man, the finder either may
 “ burn it, or presently deliver it to a magistrate : but if it concern a ma-
 “ gistrate, or other public person, the finder ought presently to deliver it
 “ to a magistrate, to the intent that by examination and industry, the
 “ author may be found out and punished. And libelling and calumnia-
 “ tion is an offence against the law of God. For *Levit. 17. Non facias*
 “ *calumniam proximo.* *Exod. 22, v. 28. Principi populi tui non maledices.*
 “ *Eccles.*

“ Eccles. 10. *In cogitatione tua ne detrahas regi, nec in secreto cubiculi*
 “ *tui diviti maledices, quia volucres cæli portabunt vocem tuam, & qui*
 “ *habet pennas annunciabit sententiam.* Psal. 69. 13. *Adversus me loque-*
 “ *bantur qui sedebant in porta, & in me psallebant qui bibebant vinum.*
 “ Job. 30. v. 7, and 8. *Filii stultorum & ignobilium, & in terra penitus*
 “ *non parentes, nunc in eorum canticum versus sum, & factus sum eis in pro-*
 “ *verbium.* And it was observed that Job, who was the mirror of
 “ patience, as appears by his words, became *quodammodo* impatient when
 “ libels were made of him; and therefore it appears of what force they
 “ are to provoke impatience and contention. And there are certain
 “ marks by which a libeller may be known; *quia tria sequuntur defama-*
 “ *torem famosum: 1, pravitatis incrementum, increase of lewdness: 2,*
 “ *bursæ decrementum, decrease of money, and beggary: 3, conscientiæ*
 “ *detrimentum, shipwrack of conscience.*”

“ John Lambs case.”

“ Mich. 8. Jacobi.”

“ In the Star-Chamber.”

“ John Lamb, proctor of the ecclesiastical court, exhibited a bill in
 “ the Star-chamber against William Marche, Robert Harrison, and many
 “ others of the town of Northampton, and against Shucburgh and others,
 “ for publishing two libels. It was resolved, That every one who shall
 “ be convicted in the said case, either ought to be a contriver of the libel,
 “ or a procurer of the contriving of it, or a malicious publisher of it,
 “ knowing it to be a libel; for if one reads a libel, that is no publication
 “ of it; or if he hears it read, it is no publication of it; for before he
 “ reads or hears it, he can't know it to be a libel; or if he hears or reads
 “ it, and laughs at it, it is no publication of it; but, if after he has read
 “ or heard it, he repeats it, or any part of it in the hearing of others,
 “ or after that he knows it to be a libel he reads it to others, that is an
 “ unlawful publication of it; or if he writes a copy of it, and does not
 “ publish it to others, it is no publication of the libel; for every one
 “ who

“ who shall be convicted ought to be contriver, procurer or publisher
 “ of it, knowing it to be a libel. But it is great evidence that he pub-
 “ lished it, when he, knowing it to be a libel, writes a copy of it; unless
 “ afterwards he can prove that he delivered it to a magistrate to examine
 “ it; for then the act subsequent explains his intention precedent. *Vide*
 “ reader, *Bract. lib. 3. tract de Corona, cap. 36, fo. 155. Fiat autem injuria,*
 “ *cum quis pugno percussus fuerit, verberatus, vulneratus, seu fustibus cæsus;*
 “ *verum etiam cum ei convitium dictum fuerit; vel de eo factum carmen*
 “ *famosum.*”

Hereupon it may be observed, 1, that *Coke* was attorney general when the first case, and chief justice when the second was adjudged. 2, By the stat. 3 *Hen. VII.* it was ordained that the chancellor and treasurer, and the keeper of the kings privy seal, or two of them, calling to them a bishop and a temporal lord of the kings most honorable privy council, and the two chief justices of the kings bench and common pleas, or other two justices in their absence, should have authority to punish certain offenders; and by the stat. 21 *Hen. VIII.* the president of the council was made their associate. After the making of these statutes it was held that the former did not raise a new court; but related wholly to the court of star-chamber; of which lord *Bacon*, in his history of *Henry the VIIth*, after mentioning the aforesaid statute, says. “ This court is compounded of
 “ good elements, for it consisteth of four kinds of persons, counsellors,
 “ peers, prelates, and chief judges. It discerneth principally of four
 “ kinds of causes, forces, frauds, crimes various of *stellionate*, and the
 “ inchoations or middle acts towards crimes capital or heinous not actually
 “ committed or perpetrated.” Now *stellionate* is a mere *civil* law term, denoting all frauds for which there is no particular denomination, and several kinds of fraud are punished *criminaliter* by that law under the name of *stellionate* that are not liable to any criminal prosecution by the laws of *England*. 3, It does not appear by what members of the court the resolutions contained in either of these cases were made, judgment being pronounced according to the majority of voices. 4, It is not improbable that the bishop was influenced by the *civil* law, which so far governed in his own court, and he might influence others. Archbishop *Laud*, who was frequently less reserved in declaring his opinion, or his reasons, than some of his brethren, when judgement was given against *Bastwick, Burton,*
 and

and *Prynne*, on which occasion he was the chief speaker, observed that the punishment of libels was in some cases capital by the *Imperial* laws, as appeared by the *Code*, l. 9. t. 36, meaning the edict of *Valentinian* and *Valens* aforecited. 5, No precedent, or authority at common law, saving the single passage in *Bracton*, which is evidently taken from *Justinians* institutes, is cited to warrant the resolutions made in these cases; and if these judges were influenced by the *civil* law informing them, it cannot reasonably be expected that they should expressly acknowledge that influence at the time when they resolved that their fellow-subjects censuring their conduct, or that of others, should become liable to such severe penalties, as in some cases to be dismember'd for it, whereby they seem to have inclined to the severity of the *Imperial* laws as far as their power would permit, capital offences not being within their cognizance.—And thus having stated the preceding particulars, I shall leave the point of influence of the *Imperial* laws upon these resolutions, which in several respects so far resembled them, to the judgment of others.

But these two star-chamber cases not only containing, according to lord *Cokes* account of them, a body of laws touching libels, but the same having been from time to time before and since the revolution quoted and relied on by the crown lawyers, references made to them, as primary authorities, by subsequent reporters, and the principal resolutions they contain delivered for law by other authors, one of whom, the author of the treatise intitled “State Law, or the doctrine of Libels discussed and examined,” speaking of the first case says, “This case contains the best system of the doctrine of libels that is to be found, and one would think is so full and plain as that all future doubts that could arise in this learning might be settled and expounded by it,” I shall endeavour in the next place to give them a proper examination, so far as relates to my proposition, and thereupon shall first consider their authority, and for that end set forth the origin and abolition of this court, with some other particulars relative to it.

Sir *Henry Spelman*, in his discourse upon the original of the terms, says, “As for the star-chamber, it is in lieu of that which was in ancient time the counsel-chamber, and *specula regni*, the watch-tower of the kingdom; where the barons and other of the kings counsel used to meet

“ *ad prospiciendam fovendamque remp.* to discover, prevent, and suppress
 “ all dangers and enormities occurrent, and to provide for the safety and
 “ good of the kingdom.”

Lord *Bacon*, in his history aforementioned, says, “ the authority of
 “ the star-chamber, which before subsisted by the ancient common laws
 “ of the realm, was confirmed in certain cases by act of parliament.
 “ This court is one of the sagest and noblest institutions of this kingdom.
 “ For in the distribution of courts of ordinary justice (besides the high
 “ court of parliament) in which distribution the kings bench holdeth
 “ the pleas of the crown, the common place pleas civil, the exchequer
 “ pleas concerning the kings revenue, and the chancery the pretorian
 “ power for mitigating the rigour of law, in case of extremity, by the
 “ conscience of a good man; there was nevertheless always reserved a
 “ high and preeminent power to the kings council, in causes that might
 “ in example or consequence concern the state of the common wealth;
 “ which if they were criminal, the council used to sit in the chamber
 “ called the star-chamber; if civil, in the white chamber, or white-hall.
 “ And as the chancery had the pretorian power for equity; so the star-
 “ chamber had the censorian power for offences under the degree of
 “ capital.”

Ld. *Coke*, in his 4th. institute, chap. 5. which treats of, “ The hon-
 “ ourable court of star-chamber, *coram rege & concilio suo*; of ancient
 “ time *coram rege in camera, &c.*” says, “ It is the most honourable court
 “ (our parliament excepted) that is in the *Christian* world, both in re-
 “ spect of the judges of the court, and of their honourable proceeding
 “ according to their just jurisdiction, and the ancient and just orders of
 “ the court; for the judges of the same are (as you have heard) the gran-
 “ dees of the realm, the lord chancellor, the lord treasurer, the lord pre-
 “ sident of the kings council, the lord privy seal, all the lords spiritual,
 “ temporal, and others of the kings most honourable privy council, and
 “ the principal judges of the realm, and such other lords of parliament
 “ as the king shall name. And they judge upon confession, or deposition
 “ of witnesses: and the court cannot sit for hearing of causes under the
 “ number of eight at the least. And it is truly said, *curia cameræ stellatæ,*
 “ *si vetustatem spectemus, est antiquissima; si dignitatem, honoratissima.* This
 “ court,

“ court, the right institution and ancient orders thereof being observed,
 “ doth keep all *England* in quiet.”
 “ Albeit the stile of the court be *coram rege & concilio*, yet the kings
 “ council of that court hear and determine causes there, and the king in
 “ judgment of law is always in court.”

Rushworth, in his historical collections [p], has given an abstract of
 a treatise written by a person well acquainted with the proceedings of this
 court, wherein, among other things, it is said that, “ without perad-
 “ venture those good laws made in *Edward III*’s time, to preserve the
 “ liberty of the subject, were chiefly grounded upon the unlimited power
 “ which this court did then take to itself.” And afterwards that, “ This
 “ court for the most part is replenished with dukes, marquesses, earls,
 “ barons; also with reverend arch-bishops and prelates, grave counsellors
 “ of state, learned judges, such a composition for justice, religion, and
 “ government as may be well and truly said (whilst so great a presence
 “ kept within their bounds) *Mercy and truth were met together.*”

“ Their number in the reign of *Henry VII.* and *Henry VIII.* have
 “ been near forty at one time, and thirty in the reign of *Elizabeth* oft
 “ times; but since much lessened. In king *Charles* time there hath
 “ been twenty four and twenty six at a time, as in the cases of Mr. *Cham-*
 “ *bers*, Sir *James Bagg*, the bishop of *Lincoln*, and others.”

“ *Archbishop Whitgift* did constantly in this court maintain the liberty
 “ of the *free charter*, that none ought to be fined but *salvo contentamento*;
 “ he seldom gave any sentence, but therein did mitigate in something the
 “ acrimony of those that spake before him; but the slavish punishment of
 “ whipping, &c. was not heard to come from the noble spirits in those
 “ times sitting in that honourable presence.”

“ When once this court began to swell big, and was delighted with
 “ blood which sprung out of the ears and shoulders of the punished, and
 “ nothing would satisfy the revenge of some clergymen but cropt ears,
 “ slit noses, branded faces, whipt backs, gag’d mouths, and withal to be
 “ thrown into dungeons, and some to be banished not only from their
 “ native country to remote islands, but by order of that court to be sepa-

“ rated from wife and children, who were by their order not permitted
 “ to come near the prison where their husbands lay in misery, then began
 “ the *English* nation to lay to heart the slavish condition they were like
 “ to come unto if this court continued in its greatness.” Then follow
 records touching ancient proceedings in this court, transcribed out of
 manuscripts which remained there, and among them the following, to
 wit,

“ *Trin. 8. Eliz. fol. 138.*”
 “ Ordinances for reformation of disorders in printing and selling of
 books.”

To elucidate this matter I shall, from the 3d. Institute, set forth the
 stat. 3 *Hen. VII.*

“ It is ordained that the chancelour and treasurer of *England*, and the
 “ keeper of the kings privy seal, or two of them, calling to them a bishop
 “ and a temporal lord of the kings most honourable privy council, and
 “ the two chief justices of the kings bench and common pleas for the
 “ time being, or other two justices in their absence, upon bill or infor-
 “ mation [q] put to the said lord chancelour or any other against any person
 “ for unlawful maintenance, giving of liveries, signs and tokens, and re-
 “ tainers by indentures, promises, oaths, writings or otherwise, imbrace-
 “ ries of his subjects, untrue demeaning of sheriffs in making of pannels,
 “ and other untrue returns by taking of money, by injuries, by great riots,
 “ and unlawful assemblies, have authority to call before them by writ
 “ or privy seal the said misdoers, and they and other by their discretion,
 “ by whom the truth may be known to examine, and such as they find
 “ therein defective, to punish them after their demerits, after the form
 “ and effect of statutes thereof made, in like manner and form as they
 “ should and ought to be punished if they were thereof convict after the
 “ due order of law.”

[q] *Quære* whether informations did not originate in this court.

“ Lord

“ Lord *Coke*, after having treated of the court of star-chamber, and
“ set forth this statute, from the whole draws six conclusions, whereof
“ the fourth is this.” Fourthly, this Act in one point is introductory of
“ a new law, which the former court had not, viz. to examine the de-
“ fendant, which being understood after his answer made, to be upon
“ oath upon interrogatories, which this ancient court proceeding in cri-
“ minal causes had not, nor could have but by act of parliament, or pre-
“ scription, the want whereof, especially in matters of frauds and deceits
“ (being like birds closely hatched in hollow trees) was a mean that truth
“ could not be found out; but before the statute the answer was upon
“ oath.”

This act expressly acknowledges that the persons who should be punished by force of it were not to be convicted after the due order of law; and as the safety of the subject requires that they be convicted only according to the due order of law, innocence of the crime being insufficient to secure the party accused when a departure from the due course of law takes place in the proceedings, it may be said, in my opinion, to have born testimony against itself. *Ld. Coke* takes no notice of this part of the act, nor that the course of judicial proceedings established by it was inconsistent with the Great Charter, which, in the proeme to his commentaries thereon, he had before observed had been confirmed, established and commanded to be put in execution by thirty two several acts of parliament; but favouring the new law thereby introduced, which gave power to the judges appointed by the act, according to their construction, to examine the defendant after his answer made, upon oath upon interrogatories, at their discretion, he assigns a reason for giving this power, which respects all the offences committed to their cognizance, tho' more especially frauds, to wit, that “ the want of it was a mean that truth could not be found
“ out.” After making this act, the party accused, instead of being tried by his peers, on presentment or indictment, and convicted upon lawful evidence, the witnesses appearing personally in open court, and giving their testimony *viva voce*, subject to that occasional and free examination which best discovers the truth, was not only liable to be tried by the judges thus appointed, on a bare information, by the written deposition of witnesses, made on examination upon interrogatories out of court; but

but moreover compellable by fine and imprisonment, to give evidence against himself, contrary to the excellent maxim of our constitution, *nemo tenetur seipsum prodere*, no man is obliged to betray himself; and it appears to me somewhat extraordinary that Sir *Edw^d Coke* should thus far approve of this compulsory power, especially considering what himself had before said in his commentary on the 29th chapter of *Magna Charta*, which provides that no freeman shall be condemned but by the lawful judgment of his peers, nor passed upon but by the law of the land, that is, by the due course and process of law; viz. “Against this ancient and funda-

11. H. VII.
cap. 3.

“mental law, and in the face thereof, I find an Act of parliament made,
“that as well justices of assize as justices of peace (without any finding
“or presentment by the verdict of twelve men) upon a bare information
“for the king before them made, should have full power and authority
“by their discretions to hear and determine all offences and contempts
“committed or done by any person or persons against the form, ordinance
“and effect of any statute made and not repealed &c. By colour of which
“act, shaking this fundamental law, it is not credible what horrible op-
“pressions and exactions, to the undoing of infinite numbers of people,
“were committed by Sir *Richard Empson*, and *Edm^d Dudley*, being
“justices of the peace, thro’ out *England*; and upon this unjust and
“injurious act (as commony in like cases it falleth out) a new office was
“erected, and they made masters of the kings forfeitures.”

1. H. VIII.
cap. 6.

“But at the parliament holden in the first year of *Hen. VIII*, this act
“of 11 *H. VII.* is recited, and made void, and repealed, and the reason
“thereof is yielded, for that by force of the said act, it was manifestly
“known, that many sinister and crafty, feigned and forged informations,
“had been pursued against divers of the kings subjects, to their great
“damage, and wrongful vexation: and the ill success hereof, and the
“fearful ends of these two oppressors, should deter others from com-
“mitting the like, and should admonish parliaments, that instead of this
“ordinary and pretious trial *per legem terræ*, they bring not in absolute
“and partial trialls by discretion.”—This passage, by the way, is submit-
“ted to the consideration of the promoters of excise laws.

And

And this author, in the first chapter of his fourth Institute, wherein he treats, “ of the High Court of Parliament,” resuming this subject, writes as follows,

“ There was an act of parliament made in the 11 year of king *Hen. VII.*
“ which had a fair flattering preamble, pretending to avoid divers mis-
“ chiefs, which were, 1, To the high displeasure of Almighty God. 2,
“ The great let of the common law, and 3, The great let of the wealth
“ of this land : and the purview of that act tended in the execution con-
“ trary, *ex diametro*, viz. to the high displeasure of Almighty God, the
“ great let, nay the utter subversion of the common law, and the great
“ let of the wealth of this land, as hereafter shall manifestly appear.
“ Which act followeth in these words :”

The king our sovereign lord calling to his remembrance that many statutes and ordinances be made for the punishment of riots, unlawful assemblies, reteinders in giving and receiving of liveries, signs and tokens unlawfully, extortions, maintenances, imbracery, excessive taking of wages contrary to the statute of labourers and artificers, the use of unlawful games, inordinate apparel, and many other great enormities and offences, which been committed and done daily contrary to the good statutes, for many and divers behoveful considerations severally made and ordained, to the displeasure of Almighty God, and the great let of the common law and wealth of this land, notwithstanding that generally by the justices of the peace in every shire within this realm in the open sessions is given in charge to enquire of many offences committed contrary to divers of the said statutes and divers enquests thereupon there straitly sworn, and charged before the said justices to enquire of the premisses, and therein to present the troth which any letted to be found by imbracery, maintenance, corruption and favour ; by occasion whereof the said statutes be not, nor cannot be put in due execution : For reformation whereof, for so much that before this time the said offences, extortions, contempts, and other the premisses might not, nor as yet may be conveniently punished by the due order of the law, except it were first found and presented by the verdict of twelve men thereto duly sworn, which for the causes afore rehearsed will not find nor yet present the truth : Wherefore be it by the advice and assent of the lords spiritual and temporal, and the commons

in this present parliament assembled, and by authority of the same enacted, ordained and established, that from henceforth as well the justices of assise in the open sessions to be holden afore them, as the justices of peace in every county of the said realm, ^a upon information for the king before them to be made, have full power and authority ^b by their discretion to hear and determine all offences and contempts committed and done by any person or persons against the form, ordinance and effect of ^c any statute made and not repealed, and that the said justices upon the said information have full power and authority to award and make like process against the said offenders and every of them, as they should or might make against such person or persons as been present and indicted before them of trespasss done contrary to the kings peace, and the said offender or offenders duly to punish according to the purport, form and effect of the said statutes. Also be it enacted by the said authority, that the person which shall give the said information for the king shall by the discretion of the justices content and pay to the said person or persons against whom the said information shall be so given his reasonable costs and damages in that behalf sustained, if that it be tried or found against him that so giveth or maketh any such information. Provided always that any such information extend not to treason, murder, or felony, nor to any other offence wherefore any person shall lose life, or member, nor to lose by nor upon the same information any lands, tenements, goods or chattels to the party making the same information. Provided also that the said informations shall not extend to any person dwelling in any other shire than there as the said information shall be given or made, saving to every person and persons, cities, and towns, all their liberties and franchises to them and every of them of right belonging and appertaining.

“ By pretext of this law *Empson* and *Dudley* did commit upon the subject unsufferable pressures and oppressions, and therefore this statute was justly soon after the decease of *Hen. VII.* repealed at the next parliament after his decease, by the stat. of 1 *Hen. VIII.* cap. 6.

“ A good caveat to parliaments to leave all causes to be measured by the golden and streight met wand of the law, and not to the incertain and crooked cord of discretion.”

“ It

^a Upon information without any indictment.

^b By their discretion, and not *secundum legem & consuetudinem Angl.* as all proceedings ought to be.

^c Obsolete statutes and all, and especially such as time had so altered from the original cause of the making thereof, as either they could not at all, or very hardly be observed and kept.

“ It is not almost credible to foresee, when any maxim or fundamental
 “ law of this realm is altered, (as elsewhere has been observed) what dan-
 “ gerous inconveniences do follow; which most expressly appeareth by this
 “ most unjust and strange act of 11 Hen. VII. for hereby not only *Empson*
 “ and *Dudley* themselves, but such justices of peace (corrupt men) as
 “ they caused to be authorized, committed most grievous and heavy op-
 “ pressions, and exactions, grinding of the face of the poor subjects by
 “ penal laws (be they never so obsolete or unfit for the time) by information
 “ only, without any presentment or trial by jury, being the ancient birth-
 “ right of the subject; but to hear and determine the same by their dis-
 “ cretion, inflicting such penalty as the statutes not repealed imposed.
 “ These and other like oppressions and exactions by or by the means of
 “ *Empson* and *Dudley*, and their instruments, brought infinite treasures to
 “ the kings coffers, whereof the king himself in the end with great grief
 “ and compunction repented, as in ^d another place we have observed.”
 “ This stat. of 11 Hen. VII. we have recited, and shewed the just incon-
 “ veniences thereof, to the end that the like should never hereafter be
 “ attempted in any court of parliament. And that others might avoid
 “ the fearful end of those two time-servers, *Empson* and *Dudley*. *Qui*
 “ *eorum vestigiis insistant, eorum exitus perhorrescant.*”

^d In the
 Chap. of
 the court of
 Wards and
 Liveries.

Here we have an express declaration made by parliament, that before the making of this act the offences thereby intended to be punished according to the course of judicial proceedings introduced by it, could not be conveniently punished by the due order of the law, except it were first found and presented by the verdict of twelve men thereto duly sworn, as well as the declaration of lord *Coke*, that proceeding by presentment and trial by jury are the ancient birth right of the subject.

These acts of the 3 and 11 of Hen. VII. which so far resemble each other, were both apparently made in direct repugnance to the great charter, notwithstanding the different treatment given them by Sir *Edw^d. Coke*. The former indeed remained in force when this great author wrote his commentaries; but this, I apprehend, will not justify his favouring so far the power thereby given to compel the person accused to give testimony against himself, resembling herein the proceedings of the holy office of inquisition; and the reason assigned by him for granting this extraor-
 I
 dinary

dinary power, to wit, that it is a mean of finding out the truth, is, as we have seen, the sole reason whereon the use of torture is founded by the *civil* law. To all which let us add what is said by baron *Puffendorf* [r],
 “ that as no man is bound to accuse himself in the civil court, or to make
 “ any voluntary confession of his crimes, so it is unjust in criminal cases
 “ to put the prisoner to declare his innocence upon oath.”

Lord *Cokes* last conclusion drawn from the stat. 3 *Hen.* VII. and from what he had said respecting the court of star-chamber, is, “ that the jurisdiction of this court dealeth not with any offence that is not *malum in se*, against the common law, or *malum prohibitum*, against some statute ;” and yet, in the case of *Eaton* against *Allen*, in his 4th. Report, it is said that this court could punish by their absolute power what was not punishable by the ordinary course of the law.

The abolition of this court, with the reasons for it, will best appear from the words of the act of parliament passed in the sixteenth year of the reign of king *Charles* I. entitled, “ An act for the regulation of the privy council, and for taking away the court commonly called the Star-chamber,” to wit :

“ Whereas by the great charter, many times confirmed in parliament,
 “ it is enacted, That no freeman shall be taken or imprisoned, or disseised
 “ of his freehold or liberties, or free customs, or be outlawed or exiled,
 “ or otherwise destroyed, and that the king will not pass upon him, or
 “ condemn him but by lawful judgment of his peers, or by the law of the
 “ land ; (2.) and by another statute made in the fifth year of the reign of
 “ king *Edward* the third, it is enacted, That no man shall be attached
 “ by any accusation, nor forejudged of life or limb, nor his lands, tene-
 “ ments, goods nor chattels seized into the kings hands against the form
 “ of the great charter, and the law of the land ; (3) and by another
 “ statute made in the five and twentieth year of the reign of the same
 “ king *Edward* the third, It is accorded, assented, and established, That
 “ none shall be taken by petition or suggestion made to the king, or to
 “ his council, unless it be by indictment or presentment of good and
 “ lawful people of the same neighbourhood where such deeds be done,
 “ in due manner, or by process made by writ original at the common

[r] Law of Nature and Nations, B. VIII. Ch. III. § 4.

“ law, and that none be put out of his franchise or freehold, unless he be
“ duly brought in to answer, and fore-judged of the same by the course
“ of the law; and if any thing be done against the same, it shall be re-
“ dressed and holden for none: (4) And by another statute made in the
“ eight and twentieth year of the reign of the same king *Edward* the
“ third, it is amongst other things enacted, That no man, of what estate
“ or condition so ever he be, shall be put out of his lands or tenements,
“ nor taken, nor imprisoned, nor disinherited, without being brought in to
“ answer by due process of law: (5) And by another statute made in
“ the two and fortieth year of the reign of the said king *Edward* the
“ third, it is enacted, That no man be put to answer without present-
“ ment before justices, or matter of record, or by due process and writ
“ original, according to the old law of the land; and if any thing be
“ done to the contrary, it shall be void in law, and holden for error:
“ (6) And by another statute made in the six and thirtieth year of the
“ same king *Edward* the third, it is amongst other things enacted, That
“ all pleas which shall be pleaded in any courts before any the kings
“ justices, or in his other places, or before any of his other ministers,
“ or in the courts and places of any other lords within the realm, shall
“ be entered and enrolled in Latin: (7) And whereas by the statute
“ made in the third year of king *Henry* the seventh, power is given to
“ the chancellor, the lord treasurer of *England* for the time being, and
“ the keeper of the kings privy seal, or two of them, calling unto them
“ a bishop and a temporal lord of the kings most honourable council, and
“ the two chief justices of the kings bench and common pleas, for the
“ time being, or other two justices in their absence, to proceed as in that
“ act is expressed, for the punishment of some particular offences therein
“ mentioned: (8) And by the statute made in the one and twentieth
“ year of king *Henry* the eighth, the president of the council is associated
“ to join with the lord chancellor and other judges in the said statute of
“ the third of *Henry* the seventh mentioned; (9) but the said judges
“ have not kept themselves to the points limited by the said statute, but
“ have undertaken to punish where no law doth warrant, and to make
“ decrees for things having no such authority, and to inflict heavier
“ punishments than by any law is warranted.”

“ II. And forasmuch as all matters examinable or determinable before
 “ the said judges, or in the court commonly called the star-chamber, may
 “ have their proper remedy and redress, and their due punishment and
 “ correction by the common law of the land, and in the ordinary course
 “ of justice elsewhere ; (2) and forasmuch as the reasons and motives
 “ inducing the erection and continuance of that court do now cease ; (3)
 “ and the proceeding, censures, and decrees of that court have by expe-
 “ rience been found to be an intolerable burthen to the subject, and the
 “ means to introduce an arbitrary power and government ; (4) and foras-
 “ much as the council-table hath of late times assumed unto itself a power
 “ to intermeddle in civil causes and matters only of private interest be-
 “ tween party and party, and have adventured to determine of the estates
 “ and liberties of the subject contrary to the law of the land, and the
 “ rights and privileges of the subject, by which great and manifold mis-
 “ chiefs and inconveniences have arisen and happened, and much incer-
 “ tainty by means of such proceedings have been conceived concerning
 “ mens rights and estates, for settling whereof, and preventing the like
 “ in time to come,”

“ III. Be it ordained and enacted by the authority of this present par-
 “ liament, That the said court commonly called the Star-chamber, and
 “ all jurisdiction, power and authority belonging unto or exercised in the
 “ same court, or by any the judges, officers or ministers thereof, be from
 “ the first day of August, in the year of our Lord God one thousand six
 “ hundred forty and one, clearly and absolutely dissolved, taken away and
 “ determined ; (2) and that from the said first day of August, neither the
 “ lord chancellor, or keeper of the great seal of *England*, the lord trea-
 “ surer of *England*, the keeper of the kings privy seal, or president of
 “ the council, nor any bishop, temporal lord, privy counsellor, or judge,
 “ or justice whatsoever, shall have any power or authority to hear, exa-
 “ mine or determine any matter or thing whatsoever, in the said court
 “ commonly called the Star-chamber, or to make, pronounce or deliver
 “ any judgment, sentence, order or decree, or to do any judicial or mi-
 “ nisterial act in the said court : (3) And that all and every act and acts
 “ of parliament, and all and every article, clause and sentence in them,
 “ and every of them, by which any jurisdiction, power or authority is
 “ given,

“ given, limited or appointed unto the said court commonly called the
 “ Star-chamber, or unto all, or any the judges, officers or ministers
 “ thereof, or for any proceedings to be had or made in the said court,
 “ or for any matter or thing to be drawn into question, examined or de-
 “ termined there, shall for so much as concerneth the said court of Star-
 “ chamber, and the power and authority thereby given unto it, be from
 “ the said first day of August repealed and absolutely revoked and made
 “ void.”

“ IV. And be it likewise enacted, That the like jurisdiction now used
 “ and exercised in the court before the president and council in the mar-
 “ ches of *Wales*; (2) and also in the court before the president and
 “ council established in the northern parts: (3) And also in the court com-
 “ monly called the court of the dutchy of *Lancaster*, held before the
 “ chancellor and council of that court: (4) And also in the court of ex-
 “ chequer of the county palatine of *Chester*, held before the chamber-
 “ lain and council of that court; (5) the like jurisdiction being exercised
 “ there, shall from the said first day of August, one thousand six hun-
 “ dred forty and one, be also repealed and absolutely revoked and made
 “ void; any law, prescription, custom or usage, or the said statute made
 “ in the third year of king *Henry* the seventh, or the statute made the
 “ one and twentieth of *Henry* the eighth, or any act or acts of parlia-
 “ ment heretofore had or made, to the contrary thereof in any wise
 “ notwithstanding: (6) And that from henceforth no court, council
 “ or place of judicature shall be erected, ordained, constituted or ap-
 “ pointed within this realm of *England*, or dominion of *Wales*, which
 “ shall have, use or exercise the same, or the like jurisdiction, as is, or
 “ hath been used, practiced or exercised in the said court of Star-
 “ chamber.”

The court of star-chamber with all its legal and assumed jurisdiction
 power and authority, being thus dissolved, taken away, and determined,
 by reason that decrees unwarranted by law, and without authority had
 been there made, and that the proceeding, censures and decrees of the
 same were so extremely grievous and pernicious in their nature and effects,
 with an inhibition to erect for the future any court which should have or
 exercise the same or like jurisdiction as had been therein exercised, the
 politic

politic framed by this court for the government of the kingdom with respect to libels was thereby annuled ; and all subsequent attempts to enforce the resolutions of this arbitrary court thus abolished, as authoritative rules or laws still subsisting, are, in my apprehension, utterly incompatible with this statute, and the rights and liberties of the kingdom. All history proves that liberty without its proper security becomes the certain victim of power, its native beauty and excellence tempting the ravisher not to preserve, but to seize and destroy it, and a little consideration, I presume, will convince the intelligent that in limited monarchies to subject the liberties of the people, and in particular the liberty of the press, wherein the rest are so nearly concerned, to the discretionary, that is the arbitrary, decisions of a court composed wholly or chiefly of the princes privy council, is in effect to prepare for their diminution or suppression, and in time for their total excision ; and such plainly was the nature of the decrees and resolutions of this court, whose proceedings were conformable to the order of the *civil* law, rather than of the fundamental laws of the land ; and what *Buchanan* said of the judges in his own country may well be said of the judges of this court, that “ their government “ was evidently tyrannical, their sole decisions being laws.” All courts do in course form such rules, decrees and resolutions as are suitable to their own nature ; wherefore the resolutions of this arbitrary court, even while it subsisted, could not, I conceive, upon the principles of law, be cited and urged as proper precedents in the constitutional courts of the kingdom : but the court of star-chamber being, for the causes, and in the manner, aforesaid utterly abolished, that the resolutions of the same thereby lost all future force, or, in other words, were thereby absolutely rescinded, so that they could not *in futuro* be cited urged and received as law under any denomination whatever, appears to me most manifest. A deadly fountain being covered up, and buried, its streams can no longer pollute the earth, nor a tree plucked up by the roots continue to bear its poisonous fruit. Causes will ever produce their effects, whether their nature and operations be in season attended to or not ; and the parliament having expressly declared that the proceeding, censures and decrees of that court had by experience been found to be an intolerable burthen to the subject, and the means to introduce an arbitrary power and government

ment, upon the adoption of these proceedings for the rule of our government can we with reason avoid this conclusion, that the same causes will in time produce the same effects?

But altho' it be thus by act of parliament declared that the proceeding, censures and decrees of the court of Star-chamber, collectively considered, were so extremely burthenfome to the subjects, and destructive of their liberties, whereupon the foundation of their authority was taken away; yet having lately seen the writings of several authors, who without particularly considering the intent, force or effect of this statute, or the nature of this court, would establish their resolutions respecting libels as good authorities in law at this day, though they scruple not to censure their decrees in other matters, seeming to proceed as if they thought it was in their power to select the resolutions of this court for preservation or condemnation at their discretion; for which purpose, among other things, it is said that "*The house of commons* were so eager in their zeal to destroy what they called *a court of inquisition*, that tho' the bill was of so great consequence, yet they sent it up to the lords with only once reading it, and without its being ever committed, which was a thing perhaps never before heard of in parliament;" and for this lord *Clarendon* is cited; intending thereby, without speaking out, to enervate, if possible, the force of the act, and give strength to those resolutions which they favour; in order effectually to oppose these and all such attempts I shall consider this matter more at large.

The most eminent foreign lawyers declare that historical and philosophical knowledge are necessary to juris-prudence; and it is evident that in free states the former is oft times more especially serviceable in forming a right judgment upon questions that relate to the liberty of the subject. Without duely distinguishing times we should be in danger of adopting for the rule of our conduct the determinations of men devoted to the pleasure of princes impatient of those limitations of power which are prescribed by the law of liberty; wherefore I shall proceed to state such historical matters as may give some light on the present occasion.

James, king of *Scotland*, acceded to the crown of *England* with such notions of regal power as were inconsistent with the constitution of this kingdom. There was an essential difference in the nature of the two monarchies;

monarchies; that of *Scotland* being absolute, and that of *England* limited: but this prince ascended the *English* throne with intent to reduce the subjects of this kingdom to the same measure of obedience with his *Scotish* subjects, and, in plain terms, to govern them both according to his own will. These erroneous notions respecting the *English* monarchy were evidently the chief source of those difficulties and calamities in which his posterity and the whole kingdom were involved. Foreign as well as *English* writers have ascribed to this prince these arbitrary notions; but it seems not to have been generally understood that with respect to *Scotland* he was an absolute prince, which power suiting and confirming his sense of the proper state of kings, probably augmented his impatience of the restraints of power contained in the *English* constitution, and occasioned his design of freeing himself from them; wherefore I shall proceed to shew what power he had in *Scotland*. Sir George Mackenzie, in his “*Jus Regium*, or the just and solid foundations of monarchy in general, and more especially of the monarchy of *Scotland*, maintained against Buchanan, Napthali, Dolman, Milton, &c.” writes as follows.

“The next thing that I am to prove in this my first proposition, is, that our king is an absolute monarch, and has the supreme power within this his kingdom, and this I shall endeavour to prove, 1. from our positive law, 2. by several reasons deduced from our fundamental laws and customs, 3. from the very nature of monarchy itself, and the opinion of lawyers who write upon that subject, and who define absolute monarchy to be a power that is not limited or restricted by co-active law. *Arnisaus de essentia majest. cap. 3. num. 4.*”

“By the 25 *act. parl.* 15. James VI. [s]. The parliament does acknowledge that it cannot be denied but his majesty is a free prince, of a sovereign power, having as great liberties and prerogatives, by the laws of this realm, and privilege of his crown and diadem, as any other king, prince or potentate whatsoever. And by the 2 *act. parl.* 18. James VI. [t], the parliament consenting to his majestys restoring of bishops, declare

[s] holden at *Edinburgh* the 19th day of December 1597.

[t] holden at *Perth* the 9th day of June 1606.

“ and acknowledge the absoluteness of our monarchy, in these words.
 “ *The remeedy whereof properly belongs to his majesty, whom the whole estates,*
 “ *of their bounden duty, with most hearty and faithful affection, humbly*
 “ *and truly acknowledge to be a sovereign monarch, absolute prince, judge*
 “ *and governour over all persons, estates and causes, both spiritual and tem-*
 “ *poral, within his said realm.*”

“ And by the first act of that same parliament, *The estates and whole*
 “ *body of this present parliament, acknowledge all with one voluntar, hum-*
 “ *ble, faithful, united heart, mind and consent his majestys sovereign authority,*
 “ *princely power, royal prerogative, and privilege of his crown, over all*
 “ *persons, estates and causes whatsoever within his said kingdom.*”

These statutes having in such expresse terms declared that the *Scottish* monarchy was absolute, it is evident there is no occasion to cite the arguments of this learned author drawn from other sources to prove it; but as the safety of the lives, liberties and estates of the subject depends not only on known certain just and equal laws, but likewise on the integrity, indifferency, skill and knowledge of those who are to pass in judgment upon them, the laws in effect being with respect to the parties concerned what their application makes them; so that unless the state, after enacting the best laws, makes proper provision for their due execution, by men of integrity, indifferency, ability and fortitude, those laws will become meer leaden rules, liable to be bent to and fro, as cunning shall devise, and power dictate, after observing that the *English* constitution was in part formed by “ the kings committing and distributing his whole power of
 “ judicature to severall courts of justice;” [u] and providing that the justices of those courts should do equal law and execution of right to all the subjects, without having regard to the kings commands, or other cause [w]; in order to shew how this matter stood in *Scotland*, I shall set forth an act made in the 8th. parliament of the said king *James*, held at *Edinburgh* on the 22d. day of May, in the year 1584, entitled,

[u] *Cokes 4th. Instit. c. 7.*

[w] 18 Ed. III. Stat. 4. A. D. 1344.

*Ane Act confirming the kingis Majesties Royal power over al Estaites and
 "subjectes within this realme",*

"FORASMEIKLE as sum persones, being lately called befor the
 "kings majestie, and his secreit council: to answer upon certaine points
 "to have bene inquired of them, concerning sum treasonable, seditious,
 "and contumelious speaches, uttered by them in pulpit, schooles and
 "utherwaies, to the disdaine and reproch of his heines, his progenitours,
 "and present council, contemptuousslie declined the judgement of his
 "heines, and his said council in that behalfe, to the evill exempill of
 "utheris to do the like, gif timous remeede be not provided. There-
 "foir our soveraine lord, and his three estaites assembled in this present
 "parliament, ratifies, and apprevis, and perpetually confirmis the royal
 "power and authoritie over al estaites, as weil spiritual as temporal,
 "within this realme, in the person of the kingis majestie, our soveraine
 "lord, his airs and succeffours, and als statutis and ordanis that his hie-
 "nes, his saidis aires and succeffours, be themselves and their councelles,
 "ar, and in time to cum sal be judges competent to al persones his hienes
 "subjectes, of quhatsumever estaite, degree, function, or condition that
 "ever they be of, spiritual or temporal, in al matters, quharin they, or
 "ony of them sal be apprehended, summond, or charged to answer
 "to sik thinges as sal be inquired of them be our said soveraine lord and
 "his counsell. And that nane of them, quhilkis fall happen to be ap-
 "prehended, called, or summond, to the effect foirsaid, presume, or
 "tak upon hand to decline the judgement of his hienes, his airs and
 "succeffours, or their council in the premisses, under the paine of
 "treason."

And in order to shew how far the liberty of speech and writing touch-
 ing public affairs was restrained in *Scotland* by laws passed in this kings
 reign, and before his accession to the crown of *England*, it may be ob-
 served that the same parliament by a subsequent act provided as fol-
 lows, — "it is statute and ordained be our soveraine lord, and his three
 "estaites, in this present parliament, that nane of his subjectes (of quhat-
 "sum-ever function, degree, or qualities) in time cumming fall presume
 " or

“ or take upon hand privatly, or publickly, in sermones, declamationes,
 “ or familiar conferences, to utter ony false, slanderous, or untrew
 “ speaches, to the disdaine, reproche, and contempt of his majesty,
 “ his councel and proceedings, or to the dishonour, hurt, or prejudice of his
 “ hienes, his parents and progenitours, or to meddle in the affaires of his
 “ hienes, and his estaite present, by-gane, and in time cumming, under
 “ the paines conteined in the acts of parliament against makers and tellers
 “ of leefinges [x]: certifying them that shall be tryed contravenors their-
 “ of, or that hearis sik slanderous speaches, and reportes not the same with
 “ diligence, the said paine sal be execute against them, with all rigour, in
 “ exemple of utheris. Attoure, because it is understand to his hienes
 “ and to his three estaites, that the buikes of the chronicle, and *De jure*
 “ *regni apud Scotos*, made be umquhile maister GEORGE BUCHANNANE,
 “ and imprinted senfine, conteinis findrie offensive matters worthie to
 “ be delecte: IT IS THEREFORE statute and ordaned, that the havers
 “ of the saidis twa volumes in their handes, in bring, and deliver the
 “ same to my lord secretaire, or his deputes, within fourtie dayes after
 “ the publication hereof, to the effect that the saidis volumes may bee
 “ perused, and purged of the offensive and extraordinarie matters spe-
 “ cified therein, not meete to remaine as recordes of truth to the
 “ posteritie; under the paine of twa hundreth pundes, of everie person
 “ failzieng heirin. And quhair ony ar not responsall to pay the said
 “ summe, to be punished in their persones, at OUR SOVERAINE LORDIS
 “ will. And to the effect that this ordinance may cum to the know-
 “ ledge of all, OUR SOVERAINE LORDIS lieges ordanis publication to
 “ be maid theirow at the mercat-croce of the head burrowes of the shires,
 “ and utheris places needfull, That nane pretend ignorance theirow:
 “ And the penaltie conteined theirow to be executed with al rigour against
 “ the havers of the saidis buikes, the said space of fourty dayes being
 “ by-past, after the publication and proclamation of the said act in every
 “ shire, as saidis.”

Notwithstanding this censure of these writings of the celebrated *Bu-*
chanan, another author of great abilities, *Le Clerc*, in his *Bibliothec-*

[x] See the act next cited.

que Choisie, observes, “ That if *James VI.* had made a right improvement of his tutor *Buchanans* lectures, he wou’d not have had such unhappy disputes with his parliaments; and if his son had been well read in *Buchanans* works, and enter’d into his sentiments, he wou’d not have left his head upon a scaffold: And his grandson perhaps, who was of his own name, if he had been trained up in the same notions, wou’d have dyed in peace upon the throne. If they had been all perswaded that they were the protectors, and not the masters, of the laws of their kingdom they wou’d undoubtedly have lived happily. If in monarchical states princes were *republicans*, their subjects wou’d become all *royalists*, by reason of the confidence they wou’d repose in their kings. Princes never have more authority than when they think, and seem fully convinced, that they have no right to augment such authority *ad infinitum*; and the people are never more obedient than when they are induced by the moderation of their princes.”

By the 2d. parliament of king *James Ist.* holden at *Pertb* the 12th. day of March 1424, an act was made in the following words.

“ ITEM. It is ordaned be the king and the haill parliament, that all leeing-makers and tellers of them, quhilk may ingender discorde betwixt the king and his people, quhair ever they may be gotten, fall be challenged be them that power hes, and tine life and gudes to the king.”

And by the 10th. parliament of king *James VIth*, holden at *LINTHGOW* the 10th. day of Decr. 1585, another act was made, entitled,

“ *Authours of slanderous speeches, or writts, suld be punished to the death.*”

“ IT IS statute and ordaned, be our SOVERAINE LORD, and three estaites, that all his hienes subjectes content themselves in quietness and dewtifull obedience to his hienes and his authoritie. And that nane of them presume, or take upon hand publickly to declame, or privately to speak or write any purpose of reproch, or slander of his majesties persone, estaite, or government: Or to deprave his lawes and actes of parliament,

ment, or misconstrue his proceedinges, quhairby only mislyking may be mooved betwixt his hienes and his nobilitie, and loving subjectes in time cumming, under the paine of death: Certifieng them that does the contrare, they sal be repute as seditious and wicked instrumentes, enemies to his hienes and the commoun-weill of this realme. And the said paine of death sal be execute upon them, with all rigour, in exemple of utheris."

From the preceding acts it appears that king *James* had an absolute dominion over the kingdom of *Scotland*, with the assent, declaration and confirmation of the representatives of it, accompanied with the most rigorous laws, restraining, or rather inhibiting, the use of speech and writing respecting himself, his family and government; for their prohibitory terms were so general, vague and indefinite, that, in my opinion, they left no safety for the people but in painful silence, relative to those subjects whereon man by his nature is so much enclined to speak his sentiments, especially considering to whose judgement every supposed offender was subjected. The judicious *Hooker*, in the 10th. section of his first book of the *Laws of Ecclesiastical Polity*, wherein he considereth how reason doth lead men unto the making of human laws, whereby politic societies are governed, observes that, "Between men and beasts
" there is no possibility of sociable communion, because the wellspring
" of that communion is a natural delight which man hath to transfuse
" from himself into others, and to receive from others into himself,
" especially those things wherein the excellency of his kind doth most
" consist. The chiefeft instrument of humane communion therefore is
" speech, because thereby we impart mutually one to another the
" conceits of our reasonable understanding." And government being instituted for the common good of the society its continuance ought certainly to be suitable to that institution; and every member having an interest in this continuance, whereon the preservation of all that is dear to him does depend, it is so natural for them, in their private or familiar conferences at least, to speak their minds concerning its administration, and it was so extremely difficult, if not impossible, in such discourses to avoid every thing which might be deemed misconstruction of this princes proceedings, that it appears to me an excess of cruelty to subject them
therefore

therefore to tortures and death: And this sovereign monarch, absolute prince, judge and governour being fallible, thro' his failings particular persons might suffer great hardships: and the minds of many are so formed that their complaints do as naturally ensue on the sense of their sufferings as the shadow follows the substance. *Arnobius*, had he lived in these times, and been acquainted with these laws, might with great reason have said that the *Scots* subjected to the loss of life those who muttered any thing amiss of their king, the representatives of the kingdom having concurred with him in making these severe laws; whereas the *Romans* suffered under laws made, wrested or extended beyond their original intention, by the emperours alone, or thro' the exercise of their open tyranny, without the least regard to any law right or justice, divine or human. And *Gronovius* might have said that the despotic power of king *James* was surrounded with such awful silence as no *Roman* tyrant ever by law enjoined. For my own part, I am unable to reconcile these *Scotch* laws with the dignity, equity, freedom, innate disposition, or fallibility of human nature, or to conceive their intent force and effect to be less than this, that the subjects being reduced to a state of absolute obedience should so comport themselves as if they esteemed this prince with all his failings infallible, his parents with their misconduct faultless, and his forefathers with all their errors blameless.

Aristotle [y] observes that a king governs willing subjects, according to law; but a tyrant the unwilling; and *Buchanan*, after citing him, says that "a kingdom is the government of a freeman among freemen, "tyranny the government of a master over slaves;" and, without undertaking the defence of his facts or positions, it may be said that he wrote with intent to shew that the kingdom of *Scotland* never was, nor ought to be, held under absolute subjection. On the contrary *Sir George Mackenzie*, who cites no positive law prior to the preceding to prove that the *Scotish* monarchy was absolute, says that the acts by him cited conferred no new right on the king, but only acknowledge what was his right and prerogative from the beginning; whereas this might be a politic method of obtaining such powers as had no prior existence. His arguments

[y] *Politic. lib. iii. c. 14.*

drawn from other sources than the positive law appear to me inconclusive ; but it is unnecessary on the present occasion to enter into the merits of this question. In case king *James* was not an absolute monarch by the constitution of the kingdom, but was made so by statutes obtained from parliaments by the too great influence of their monarch, and the too great pusillanimity of parliaments, who could not resign the rights and privileges of the people, since they had no warrant from them for that effect, as some suggested, this I conceive would rather augment than lessen the hopes of king *James* to obtain and establish the like absolute power in *England*.

Notwithstanding the notoriety of this princes designs upon the *English* liberties, continued through the course of his reign, I shall for the illustration thereof set forth some part of his conduct at the beginning of it. On the 3d. of May 1603 he arrived at *Theobalds*, where he made three *Scotch* peers, and Sir *James Elphinstone*, his *Scotch* secretary, members of his council; and on the 19th. at *Greenwich* he issued a proclamation upon the union of the kingdoms of *England* and *Scotland*, wherein, after declaring that he would with the advice of the states and parliaments of both kingdoms make the same perfected, in the mean time, til the said union should be established, his majesty did thereby repute hold and esteem, and command all his heighness subjects to repute hold and esteem, both the two realmes as presently united, and as one realme and kingdom, and the subjects of both the realmes as one people, brethren, and members of one body. This immediate union or incorporation of the two kingdoms was apparently an act suitable to an absolute sovereignty over both. And there having been a great resort of persons to see the king on his arrival, by his proclamation of the 23d. of June, for the reasons therein mentioned, he issued the following order,

“ We will and command all gentlemen and others, as well such as have
 “ any kind of charge in the counties of their ordinary habitation, as
 “ of other sort, that yf they have not some speciall cause of attend-
 “ ance at our court for our service, or for some necessary cause concerning
 “ their own estate, whereof they may inform our privie counsell, they
 “ shall, ymediatly after the end of this terme, depart our said cittie of
 “ London; and the suburbs thereof, and return to their several habita-
 “ tions

Rymeri
Foed:

Idem.

“ tions in the counties of their abode, untill the time of our coronation
 “ be come, at what tyme we shall not mislike to have them retourne
 “ untill that solempnitie be passed.”

“ And bicause we perceave that heretofore there hath been a great ne-
 “ glect in obeying proclamations published upon just causes, we do ad-
 “ monish all those whom this proclamation concerneth, to be so warie
 “ as we have not just cause to make them an example of contempt, which
 “ we must and will do, yf, after the term ended, we shall fynde anye
 “ makeinge stay here contrarie to this direction.” And by his procla-
 mation of the 8th of July, for the concord of the *English* and *Scots*,
 after declaring that in his *English* subjects, from the highest to the
 lowest, he had observed great love, and general obedience to him and
 his commandments, he said that seeing it had pleased Almighty God
 to call him to the *supreme* power over both [kingdoms] he was pur-
 posed to be an universal and equal sovereign to them both. By his
 proclamation of the 11th of January, issued for calling a parliament,
 he assumed the power of regulating the elections of the members to be
 chosen at his discretion, and of enforcing his regulations by penal sanc-
 tions, subjecting the cities and boroughs not observing them to fines,
 and to the forfeiture of their liberties; concluding with these words,
 “ and if any person take upon him the place of a knight, citizen, or bur-
 “ gesse, not being duely elected, returned and sworne, according to the
 “ lawes and statutes in that behalfe provided, and according to the
 “ purport effect and true meaning of this oure proclamation; then every
 “ person, soe offending, to be fyned and imprisoned for the same”;
 thereby putting his proclamation upon an equal foot with the laws and
 statutes of the kingdom in points of the greatest importance. In this
 proclamation his majesty boasts of his long experience of kingly govern-
 ment, and what sort of government he had experienced has been already
 shewn. According to *Rapin*, “ immediately after the opening of the
 “ parliament, the commons examining, according to custom, the con-
 “ tested elections, there was a debate in the house about the return of
 “ Sir *Francis Goodwin*, and Sir *John Fortescue*, for knight of the shire
 “ for the county of *Bucks*, and upon a full hearing Sir *Francis* was de-
 “ clared duly elected. Three days after, the lords sent a message to the
 commons,

Rymeri
Foed.

Idem.

March,
23d.

“ commons, that there might be a conference about *Goodwins* election.
 “ The commons, surprized at so extraordinary a message, answered, they
 “ did not think themselves obliged to give an account of their proceed-
 “ ings, and therefore could not grant the conference required. The
 “ lords replied, the king having been acquainted with what had passed
 “ in *Goodwins* case, thought himself engaged in honour to have the affair
 “ debated again, and had ordered them to confer with the commons
 “ upon it. Whereupon the commons, by their speaker, gave their reasons
 “ to the king why they could not admit of this innovation. But all they
 “ could obtain was, that, instead of a conference with the lords, the
 “ king commanded them to confer with the judges. This pleased them
 “ no more than the other. They set down their reasons in writing, and de-
 “ livered them at the council chamber, to desire their lordships to inter-
 “ cede for them to the king, not to violate their privileges. The answer
 “ was, the king absolutely commanded them to have a conference with
 “ the judges. The commons were extremely surprized at so absolute an
 “ order. Mean while, fearing to be accused of too easily engaging in
 “ a quarrel with the king, they thought it more proper to yield than
 “ stand out, fully bent however to adhere to what had been determined
 “ in the case of the contested election. Certainly the king had engaged
 “ in a very nice affair, and probably would not have come off with
 “ honour, had he not been disengaged by *Goodwins* moderation. Sir
 “ *Francis* chusing to forfeit his right rather than occasion a quarrel be-
 “ tween the king and the commons, desired the house to order the
 “ county of *Bucks* to elect another knight in his stead. The king and
 “ commons equally accepted of this expedient, which prevented them
 “ from coming to extremities; but the king found from hence that no
 “ great account was made of the proclamation upon calling the parlia-
 “ ment, whereby he meant to be master of the elections.”

On the 17th of October, in the 2d year of his reign, his majesty, by his letters patent, imposed a duty of six shillings and eight-pence on every pound weight of tobacco which after the 26th day of that month should be imported into the kingdom by any *English* merchants, or strangers, or other persons, over and above the former custom of two pence upon the pound weight; and thereby provided, that the officers of his customs should

Rymeri
Fœd.

thereafter suffer no entries to be made of any tobacco at any time to be imported, before the said custom and imposition should be paid, or composition made for the same with those officers, under the penalties contained in these words, “ upon payne that if any merchaunte English or
 “ straunger, or other whatsoever, shall presume to bringe in anye of the
 “ saide *tabacco*, before suche paymente and satisfactiōe firste made,
 “ That then he shall not onlie forfeite the saide *tabacco* ; but alsoe shall
 “ undergoe such further penalties and corporall punishmente as the
 “ qualitie of suche soe highe a contempte against our royall and ex-
 “ presse commaundement in this mannere published shall deserve.” And on the 3d of November following his Majesty, by his letters patent, imposed a duty of five shillings and sixpence on every hundred weight of currans imported. These letters patent are not contained in *Rymers* collections ; but by the first article of impeachment against lord chief baron *Davenport*, made in July 1641, it is declared that in Michaelmas term, in the fourth year of the reign of king *Charles*, his majesties then attorney general exhibited an information by *English* bill in the exchequer against *Samuel Vassall*, merchant, setting forth “ that king *James*, by his
 “ letters patent dated 3th Novr. in the second year of his reign, did
 “ command the said imposition of five shillings and six pence upon
 “ every hundred weight of currans should be demanded and received ;
 “ and that his majestie [that then was], by his letters patent, dated the
 “ six and twentieth day of July, in the second year of his reign, did by
 “ advice of his privy-council, declare his will and pleasure to be, That
 “ subsidies , customs and impost should be levied in such manner as they
 “ were in the time of king *James*, and the same, and the farms thereof
 “ to continue until it might receive a settling by parliament, and com-
 “ manding the levying and receiving the same accordingly [y].” And by another proclamation, of the 20th of October preceding, for the union of the two kingdoms, his majesty, after saying many things, expressed himself thus in relation to it, “ whereof many particularities
 “ depending upon the determination of the states and parliaments of
 “ bothe realms, we leave them there to be discussed, according to the
 “ commissions graunted by the severall actes of bothe parliaments, and

[y] *Rushworths Collections*, vol. 4th. p. 334.

“ some

“ some other things resting in our own Imperial power as the head of
 “ both : We are purposed, towards the buildinge of this excellent worke,
 “ to do by Oureself that which justlie and safelie We may by our *absolute*
 “ power doe; and for a first stone of this worke, whereupon the rest
 “ may be laid, seeing there is undoubtedlie but one head to both people,
 “ which is Oureself, and that unfainedlie we have but one hart and
 “ mynd to communicate equally to both states, as lynes issuing from one
 “ center, our justice, our favors, and whatsoever else dependeth upon the
 “ unitie of our *supreme* power over bothe.” After which his majesty
 thereby assumed the stile of “ King of Great Britain, France and Ireland,
 “ Defender of the Faith, &c.”

Sir George Mackenzie supposes that the *Scots* and *English* became *con-*
vassalli, the fellow-vassalls of king *James* on his accession to the crown
 of *England*; and this prince intending to be the absolute lord over both,
 in order to reduce the *English* to this state of obedience, the chief instru-
 ments he made use of were his privy council, the court of star-chamber,
 his judges and lawyers, the two first being composed of the same persons,
 and all holding their places at his pleasure, who expected their com-
 pliance with it. The king in his first speech to his parliament expressed
 some regard for his *Roman* catholick subjects; but the puritans, he said,
 were a “ sect unable to be suffered in any well-governed common wealth.”
 And on the 13th of February following, all the judges being by the kings
 command assembled, with many of the nobility, including the great
 officers of state, in the star-chamber, to give their opinions touching the
 legality of the deprivation of the puritan ministers, and of the petition
 of the puritans, after this business was over, many of the lords declared
 that some of the puritans had raised a false rumour of the king, that he
 intended to grant a toleration to the papists, which offence the judges
 held punishable by grievous fine, by the rules of the common law in the
 kings bench, or by the king and his council, or, since the stat. of
 3 *Hen. VII.* in the star-chamber.

The court of star-chamber in the begining of this reign, by condemn-
 ing the parties accused for light offences in exorbitant fines to the kings
 use, was become a terrour even to the Great; and by their proceeding
 from time to time without just regard to the nature of offences, and of

the evidence adduced to prove them, they continued a grievance and terrour, until the amplitude and multiplicity of their oppressions caused the dissolution of this court, the necessity whereof may be farther evinced from lord *Clarendon*. An unconstitutional and oppressive court subsisting in the North, in order to its abolition, being the manager for the commons of a conference with the lords, held on the 22d of April 1641, he began his speech thus. “ I am commanded by the knights, citizens
 “ and burgeses of the house of commons, to present to your lordships
 “ a great and crying grievance ; which though it be complained of in
 “ the present pressures but by the northern parts, yet by the logic and
 “ consequence of it it is the grievance of the whole kingdom. The
 “ court of the president and council of the North ; or, as it is more
 “ usually called, the court of *York* ; which by the spirit and ambition of
 “ the ministers trusted there, or by the natural inclination of courts to
 “ enlarge their own power and jurisdiction, hath so prodigiously broken
 “ down the banks of the first channels in which it ran, hath almost
 “ overwhelmed that country under the sea of arbitrary power, and involved the people in a labyrinth of distemper, oppression and poverty.” And after giving an account of the erection of this court, 31 *Hen. VIII.* by commission, which was no other than a commission of *oyer and terminer*, only that it had a clause at the end of it for the hearing of all causes real and personal. *Quando ambæ partes, vel altera pars, sic gravata paupertate fuerit, quod commodè jus suum secundum legem regni nostri aliter persequi non possit.* Which he supposed to be illegal, adding that whether they exercised that part of the commission at all, or so sparingly that poor people found ease and benefit by it, he knew not ; but at that time he found no complaint against it. He then said, that, “ till the coming
 “ in of king *James*, the commission continued still the same, and that
 “ in the first year of his reign to the lord *Sheffield* varied no otherwise
 “ from the former ; save only it had reference to instructions which
 “ should be sent, though whether any were sent or no is uncertain, for
 “ we can find none. In June, in the 7th year of the reign of king
 “ *James*, a new commission was granted to the same man (the lord
 “ *Sheffield*) very differing from all that went before, it being left out,
 “ that they should enquire, *per sacramentum bonorum & legalium hominum,*
 “ and

“and to hear and determine *secundum leges Angliæ*; relation being had
 “only to the instructions, which were the first instructions we can find
 “were sent thither;” and after coming to the instructions and com-
 missions under which that part of the kingdom then groaned and lan-
 guished, among other things, he said, “I shall not trouble your lord-
 “ships with the ninth instruction, though it be but short, which intro-
 “duceth that *miseram servitutem, ubi jus est vagum & incognitum*, by re-
 “quiring an obedience to such ordinances and determinations as be or
 “shall be made by the council table, or high commission court: a griev-
 “ance, my lords, howsoever *consuetudo & peccantum claritas nobilitaverit*
 “*banc culpam*, of so transcendent a nature, that your lordships noble justice
 “will provide a remedy for it with no less care than you would rescue
 “the life and blood of the commonwealth.” He observed that the
 thirtieth instruction erected such an empire, such a dominion, as should
 be liable to no contrary, afterwards saying thus. “What hath the good
 “northern people done, that they only must be disfranchised of all their
 “privileges by *Magna Charta*, and the Petition of Right? For to what
 “purpose serve these statutes if they may be fined and imprisoned with-
 “out law, according to the discretion of the commissioners?” And in the
 subsequent part of his speech he uses these words. “Your lordships
 “remember the directions I mentioned of *Magna Charta*, That all pro-
 “ceedings shall be *per legale iudicium parium, & per legem terræ*; now
 “these jurisdictions tell you you shall proceed according to your dis-
 “cretion; that is, you shall do what you please; only that we may not
 “suspect this discretion will be gentler and kinder to us than the law,
 “special provision is made, no fine, no punishment shall be less than
 “by the law is appointed, by no means, but as much greater as your
 “discretion shall think fit: And indeed in this improvement we find
 “arbitrary courts are very pregnant: If the law require my good be-
 “haviour, this discretion makes me close prisoner; if the law sets me
 “upon the pillory, this discretion appoints me to leave my ears there.”
 How far what is here said may well be applied to the court of star-
 chamber is obvious. And his lordship, in his history of the Rebellion,
 after taking notice that projects of all kinds, many ridiculous, many scan-
 dalous, all very grievous, were set on foot; and mentioning ship-money
 with

with others, writes thus. " For the better support of these extraordinary ways, and to protect the agents and instruments who must be employed in them, and to discountenance and suppress all bold enquiries and opposers, the council-table, and star-chamber enlarge their jurisdictions to a vast extent, holding (as *Thucydides* said of the *Athenians*) for honourable that which pleased, and for just that which profited; and being the same persons in several rooms, grew both courts of law to determine right, and courts of revenue to bring money into the treasury; the council-table by proclamations enjoining to the people what was not enjoined by the law, and prohibiting that which was not prohibited; and the star-chamber censuring the breach and disobedience to those proclamations by very great fines, and imprisonment; so that any disrespect to any acts of state, or to the persons of states-men, was in no time more penal, and those foundations of right by which men valued their security, to the apprehension and understanding of wise men, never more in danger to be destroyed."

Could *Selden*, *Milton*, or colonel *Titus* in stronger terms describe the despotic domination exercised over the people of *England*, and enforced by the court of star-chamber, or can it now be said that this the chief engine of lawless dominion was not become fit for excision, or that its doctrines, decrees, and proceedings were worthy of perpetual imitation, force, and obligation?

With respect to the proceeding of the house of commons, which concluded in passing a bill for the dissolution of the court of star-chamber, it may be observed that on the 1st of Decr. 1640 the petition of *Richard Chambers* of *London*, merchant, delivered in a former parliament, was read, complaining of his sentence in the star-chamber, 4 and 5 *Car.* and of the proceedings of the barons of the exchequer in relation to his goods seized at the custom-house. After this petition was read, Mr. *Vassall*, a member of the house, delivered his grievances by word of mouth, much of the same nature with those of Mr. *Chambers* as to the court of exchequer; whereupon a committee was appointed to consider this petition and complaint, with power to send for parties, witnesses, papers, records, or any thing else that might conduce to this business, and to meet in the exchequer-chamber. On the same day the
several

several petitions of *William Prynne*, formerly a barrister at law, late exile and close prisoner in the isle of *Jersey*, of *Henry Burton* [formerly minister of the parish church of *St. Mathew Fridaystreet*] late exile and close prisoner in castle *Cornet* in the isle of *Garnsey*, and of *John Bastwick*, doctor in physic, lately retained close prisoner and exile in the isle of *Scilly*, were presented and read. Mr. *Prynne* complained of certain proceedings against him in the court of star-chamber, for writing his *Histrio-mastix*, for which he was fined £. 5000 to his majesty, expelled the university of *Oxford*, and *Lincolns-inn*; degraded, put from his profession of the law, set in the pillory in the palace-yard, *Westminster*, where he lost one of his ears, and three days after on the pillory in *Cheapside*, where he lost the other ear, his books which had been licenced being there publickly burned before his face by the hang-man, and was adjudged after all this to remain a prisoner during his life [a]; and complained that after the said censure, to defame and injure him the more, he was charged wrongfully in the decree, as censured for perjury, though not taxed for it by the court; and after mentioning the illegal taking away of his books between his sufferings in the pillory, which had been twice surveyed, and restored to him by order of the lords, by warrant from the high commission, signed by archbishop *Laud* and others, complained that afterwards, by an indirect order procured out of the said court of star-chamber, sent to the tower to be executed, he was shut up close prisoner, and Dr. *Reeves* sent thither to search for a pamphlet which the archbishop would have father'd upon him; and that about three years and half before presenting this petition, during his imprisonment, by means of the said archbishop, a new information was exhibited in the said court against him and others, with certain books annexed, opposing the hierarchy, and censuring the proceedings of the bishops, the high-commission and ecclesiastical courts in various respects; and that although no witness was produced to prove him either author or disperse of any of the said books; yet by denying him liberty to draw up his own answer,

[a] The tryal of Mr. *Prynne* and others began the 7th of Feb. 1633. It does not appear from the State tryals when this sentence was pronounced; but it was executed on the 7th and 10th of May following.

when his counsel assigned refused to do it, by close imprisoning himself and his servant, by debaring him pen, ink and paper whereby to answer or instruct his counsel, searching his chamber, and taking away part of his answer there found; denying him access to his counsel, and conference with his co-defendants, even at counsel; threatening one of his counsel sent by the lord keeper to the tower to draw up his answer, and commanding him not to sign it when engrossed, and by refusing to accept his answer signed by himself, and his other counsel, though tendered at the office, and in open court at the hearing, the said information was taken *pro confesso*, and he was thereupon fined £. 5000 to his majesty, pillored, stigmatized on both cheeks, and the remainder of his ears cut off, to the hazard of his hearing and life, and adjudged to perpetual close imprisonment in the goal of *Carnarvan* castle, which he calls a nasty dog-hole; and that after the execution of this sentence he applied to the archbishop, desiring him to release or bail his servant, who was detained close prisoner ten weeks in a messengers hands, and often examined and solicited by promises and threats causelessly to accuse the petitioner, against whom they wanted evidence, so that he might attend him during his sores, which the archbishop utterly refused, saying that he intended to proceed against him in the high commission court, where he had ever since vexed, censured and banded him from prison to prison, only for refusing to accuse and betray the petitioner; and also that in addition to this last heavy sentence he was by an order in the said court inhibited the use of pen, ink and paper, and all books, except the bible, common-prayer, and some books of devotion; and after mentioning his removal from the tower to *Carnarvan*, before his wounds were perfectly cured, and the citation of his friends who visited him in his passage, to appear before the lords of the privy-council, and their prosecution therefore in the high commission court, though his conductors had no order to restrain any person from resorting to him; and after mentioning sundry grievances suffered by himself, and his friends on his account, by various ecclesiastical proceedings, he complained that after continuing ten weeks close prisoner in *Carnarvan*, he was by a warrant from the lords of the council ordered to be transported as an exile into one of the castles in the isle of *Jersey*, permitting his conductors only to speak with him in his passage; whereupon

whereupon he was embarked in a leaky vessel, and after a very tedious and dangerous passage in the winter season arriving at the said island he was made close prisoner in *Mount Orguile* castle, where the lieutenant governor by another extrajudicial order was commanded to confine him close in a chamber, to suffer none but his keepers to speak with him, to intercept all letters to him, to permit him neither pen, ink, nor paper, either to write to his friends for necessaries, or to petition for relief, and to allow him only the books aforementioned, without giving any order for his dyet; so that he had certainly perished, in his almost three years close imprisonment, if not sustained by the noble charity of his keepers: Whereupon he prayed the honourable house to take his tragical grievances of near eight years continuance, of new and dangerous example, into their just consideration, that they might not become precedents to the prejudice of posterity, and to grant him the proper orders requisite for the effectual support of his petition, with such relief as the justice of his cause should merit.

Mr. *Burton* set forth that, having on the 5th of November 1636 preached two sermons in his own parish church, he was thereupon summoned to appear before Dr. *Duck*, one of the commissioners for causes ecclesiastical, at *Chefswick*, and having stated the proceedings before that judge, with his appeal to the king, he complained that notwithstanding his appeal, entered in writing by Dr. *Ducks* direction, a special high commission court shortly after called at *London*, illegally suspended him in his absence, by means whereof, and of the said commissioners threats, he kept his house til a serjeant at arms, with divers pursuivants and other armed officers, assisted by the sheriff of *London*, at eleven of the clock at night forcibly brake into his house, took out of his study such books as they pleased, and carried him to prison, and the next day, the 2d of February, by a pretended order from the lords of the council, he was conveyed to the fleet, and there closely imprisoned, during which imprisonment he was, by information exhibited in the court of star-chamber, charged, *inter alia*, with publishing a book containing *An Apology for an appeal*, with his two sermons entitled *God and the King*. He then set forth the making of his answer with the advice of his counsel, who signed it, the admission of it, and the subsequent reference thereof to

the two chief Justices, who expunged the whole as impertinent and scandalous, save only the *Not Guilty*, with other proceedings confusedly stated, as they stand in *Rushworth*; after which he complained that the information being taken *pro confesso* the court censured him in a fine of £5000 to the king, to be deprived of his benefice, degraded from his ministerial function and degrees in the university, and ordered to be set on the pillory, both his ears to be cut off, confined to perpetual close imprisonment in *Lancaster* castle, debarred the access of his wife, or any other but his keeper, and denied the use of pen, ink and paper, all which, except the fine, was executed accordingly; and that after twelve weeks close imprisonment in the common goal of that castle, he was, to the hazard of his health and life, by an extrajudicial order, transported in the winter season to the castle of *Guernsey*, where he remained near three years, and his wife prohibited on pain of imprisonment, to set her foot on the island, contrary to the laws of God and the liberties of the kingdom. Whereupon he prayed the honourable house to take his cause into consideration, to assign him counsel, and grant him an order for the copies requisite for the maintenance of it.

Dr. *Bastwick*, after representing that he had about six years before set out a book in Latin, called *Elenchus religionis papisticæ*, with an addition called *Flagellum Pontificis, & episcoporum Latialium*, wherein, to prevent the misinterpretation of his good intentions, he had fully declared in his epistle to the reader, that he meant nothing against such bishops as acknowledged their authority from kings and emperours; yet because, the better to shew the papal usurpation over other princes, he had by way of argument maintained, like other orthodox writers on that subject, a parity of the said bishop of *Rome* and all other bishops and presbyters, denying his and their supremacy over other ministers to be by divine institution, complained that a pursivant did by authority from the high commission court thereupon, in his absence, enter, and, assisted with the bayliffs and constables, ransack his house at *Colchester*, violently break open his study, and carry away divers of his books, writings, and what else the pursivant pleased, without making restitution — that he was then [farther] prosecuted in the high commission court, principally for his said book, fined £1000 to the king, excommunicated, debarred to practice physic
[ordered]

[ordered] to pay cost of suit, and be imprisoned till he should recant, asserting that he was thus heavily censured only for having maintained the king's prerogative against the papacy; and charging archbishop *Laud* with having patronized and defended a book wrote to maintain and defend the papal religion and church of *Rome*; alledging also that at the declaration of the censure all the bishops then present denied openly that they held their jurisdiction from the king, affirming that they had it from God only, the archbishop maintaining the church of *Rome* to be a true church. He likewise further complained, that having thereupon, and for vindicating his innocency as to the matters for which he was unjustly censured, published another book in Latin, entitled, *Apologeticus ad prefules Anglicanos*, expressing the truth of the proceedings and speeches at his said censure, an information was exhibited against him and others in the star-chamber for the said book, and another called the *Letany*, not then in print, his answer whereunto not being accepted, but the information taken *pro confesso*, he was censured in £. 5000 to the king, to stand in the pillory, and lose both his ears, and be close imprisoned in *Lancaster* castle, all which was severely executed upon him, to the peril of his life; after all which he was, by what order he knew not, it being no part of his censure, transported thence to the island of *Scilly*, a place barren, and devoid of common necessities, where he had been close confined above three years, and none of his friends suffered to come to him, his wife being by order of the lords of council prohibited under pain of imprisonment, to set foot on the island; and that he sustained besides great straits and miseries during the said time, all which was contrary to the laws of God and man, and the liberties of a free subject, to the utter undoing of him, his wife and children. Whereupon he prayed that honourable assembly to take those his pressing grievances into their consideration, and to afford him such relief as should seem consonant to justice and equity, and to assign him counsel, and grant him an order for the necessary copies, with a warrant to bring in his witnesses.

On the same day the petitions of *Peter Leigh* and *Richard Golburn* of the city of *Chester* were presented and read. They complained that they had been most severely sentenced in the high commission court at *York* only for visiting Mr. *Prynn* in his passage to *Carnarvan* castle. After

all these petitions had been owned and avowed a large committee was appointed to take them into consideration, who had power to receive all petitions of the like nature, and to consider of the jurisdiction of the high commission courts of *Canterbury* and *York*, and of the several abuses committed in those courts, or by any judges or officers of those courts; and of the court of star-chamber, with power to send for parties, witnesses, papers, records, or any thing else conducive to the business, and to assign and hear counsel. To meet the next day in the star-chamber.

Mr. *Lambert Osbaldston* [late master of *Westminster-school*] presented his petition to the house of lords, wherein he represented that one *Walker* and *Cadwallader Powell*, servants of the bishop of *Lincoln* [Dr. *Williams*] subpœnaed to be defendants in a third information in the star-chamber against the said bishop, had, to gratify the archbishop of *Canterbury*, and free themselves from this information, conspired to accuse the petitioner, and did thereupon most unlawfully break up hampers, and rifle the papers of their lord, then imprisoned in the tower, for letters of the petitioner to him, intercepting other letters so directed, conveying them all into the hands of *Richard Kilvert*, whom they forced to shew them to the archbishop, and put them into an information against the petitioner; and that the said *Walker* also produced some letters or notes of his own lords, tho' express commandment of secrecy was therein contained, whereby, with his own testimony, he interpreted the said letters contrary to the petitioners true sense and meaning, as he had several times sworn; and that by this perfidious combination certain words of *Little Urchin* and *Hocus Pocus*; as also of *Great Don* and *Leviathan*, had been, contrary to the truth, applied to the archbishop of *Canterbury*, and the lord treasurer; that he had been sentenced and fined in the star-chamber to be deprived and degraded of all his spiritual preferments, to pay a fine of £. 5000 to his grace, when all his means were taken away—to have his ears nailed to the pillory in the deans yard in *Westminster*, before the scholars whom he had successfully taught, and to other ignominious punishments; and forasmuch as this sentence could not be prevented by the most humble submission to his grace before, or by a multitude of petitions and earnest requests made by the petitioner and his brother to his grace after the sentence was pronounced by their
unjust

unjust proceedings, by supposing against law the petitioners letters to have been published by the bishop of *Lincoln*, tho' there was no proof that the bishop received them, who upon his oath denied it, nor any man charged to have seen them, and that damages of £.5000 were given to his grace, who was neither plaintiff nor relator in the cause, by a kind of compliment of the lord keeper : He for those great and high concussions in this prosecution implored their lordships justice, to have his grievous sentence suspended til their lordships should have heard the cause ; his freehold sequestred ; himself licenced to prosecute his grievances in person ; and the cause directed to such a course of proceeding as should seem most convenient to that honourable assembly.

Echard says that when Mr. *Osbaldeston* lost his school by means of the severe sentence in the star-chamber [pronounced in Feb. 1638] there were above fourscore doctors of the three faculties in the two universities who gratefully acknowledged their education under him. He escaped the intended ignominious punishment, by getting out of court, where he had stood unobserved, before his sentence was closed ; and going directly to his study at the school, after burning some writings, he left a paper upon his desk whereon he wrote, *If the archbishop enquire after me, tell him I am gone beyond Canterbury* ; whereupon messengers were sent to the port-towns to apprehend him ; but he lay concealed in town till the parliament met in November 1640.

Bishop *Williams* was jointly prosecuted with Mr. *Osbaldeston*, they being charged with having plotted together to divulge false news and lies, to breed a disturbance in the state, and difference between two great persons and peers of the realm, the late lord treasurer *Weston*, and the archbishop of *Canterbury*. Doctor *Williams*, in the latter part of the reign of king *James*, had been considered as an able statesman, and thereupon made lord keeper. In faithfulness to his majesty he took the most favourable opportunity [when his conscience was tender and humble] to shew him the way of a good king as well as of a good christian in these points, 1st. To call parliaments often, to affect them, to accord with them. To which proposal it is said he fully won his majestys heart. 2d. To allow his subjects the liberty and right of the laws, without intrenching by his prerogative ; which he attended to with much patience, and repented
he

he had not lookt into that counsel sooner: but on the accession of king *Charles* this prelate was held in less esteem; nevertheless he gave to his majesty such faithful and wholesome counsel, as duly considered might have been attended with happy consequences to himself and his kingdom, advising the observance of temperate and conciliating measures with his first parliament; and their adjournment to *Oxford* being proposed in council at *Hampton-Court*, on the 10th of July 1625, he opposed this motion with pregnant reasons, which the favorite *Buckingham* treated with scorn, instead of examining their force; but who having gained an unhappy ascendancy over the kings judgment as well as affections his influence over ruled all objections, in consequence whereof the parliament continued their session at *Oxford* on the first of August following, where complaints, chiefly against the favorite, with sharp contests, ensuing, “the commons were by the court, then at *Woodstock*, censured for spiteful and seditious, therefore not fit to continue, but to be dissolved. Which resolution being brought to the clerk of the crown to dissolve them on the 12th of August,” bishop *Hacket* says, “the Keeper did never so bestir him since he was born, as to turn the tide, with reasons, with supplications, with tears, imploring his majesty to remember a time when, in his hearing, his blessed father had charged him to call parliaments often, and continue them, though their rashness sometimes did offend him; that in his own experience he never got good by falling out with them. *But chiefly, Sir, says he, let it never be said that you have not kept good correspondence with your first parliament. Do not disseminate so much unkindness through all the counties and boroughs of your realm. The love of your people is the palladium of your crown. Continue this assembly to another session, and expect alteration for the better. If you do not so, the next swarm will come out of the same hive.* To this the lords of the council did almost all concur; but it wanted *Buckingham's* suffrage; who was secure that the kings judgment would follow him against all the table. So this parliament was blasted, *et radicis vitium in fructibus nascentibus ostenditur.* The root failed, and the fruit was unfavoury in all the branches that grew up after it.” Before the dissolution of the parliament was considered in council the Keeper had likewise given to *Buckingham* the best advice, using the most cogent

cogent arguments to dissuade him from this design, advising that a fair and friendly promise should be made to the members of their meeting again after *Christmas*, and that he should requite injuries with benefits, saying, "no man that is wise will be angry with the people of *England*," at the same time renewing his former counsel, that he should make a more prudent and moderate use of his power; and in conclusion telling him that, if he liked not this advice, truth would in time find an advocate. The duke replied, "I will look whom I trust to," and flung out of the chamber with a menacing countenance, his ambition overcoming his reason, and his boundless confidence in the king's favour having rendered him so imperious, that he was incapable of salutary advice; yet such is the condition of human affairs, we find, under the best form of government, when the true spirit of it is lost, that the honour, safety and welfare of the king and kingdom were become dependent on the will of this improvident man, the king being, unhappily, so far prejudiced in his favour that, having through his influence declared war against *France*, in order to maintain it, he was appointed captain general and admiral, with the command of an army and fleet, though a stranger to military service by sea and land; his ill success, with the national loss and disgrace, being suitable to his presumption and his talents; but insufficient to efface the royal prejudices; and, though devoid of sound policy, being esteem'd by his majesty, as well as by his adherents and sycophants, a great statesman, under pretence of maintaining the royal prerogative, he boldly invaded the public rights, and, with his partisans, created such breaches between the king and his parliaments as were never healed, his intention being to establish an absolute power in the king, in order that, in his name, he might be the real master, and govern all things according to his own will, and by his own conduct giving the house of commons ample reason to declare, in their remonstrance to his majesty, that the principal cause of the evils and dangers of the kingdom was his excessive power, and his abuse of it; and no prince in *Europe* could, I conceive, by prosecuting the sharpest war against king *Charles* have become so dangerous to him as this favourite was, who by his great influence misguiding his actions, and overruling all wiser counsels, and for the sake of his own safety and aggrandisement, encreasing and confirming the errors touching

touching the regal power which this prince had imbibed in his fathers court, dishonoured and embarrassed him, distressing his affairs both at home and abroad, disgusted his parliaments, broke up the common tranquillity, and by his whole conduct caused the diminution, or alienation of the peoples affections, which are ever the chief safety as well as the glory of the prince.

In October following the great seal was taken from doctor *Williams*, without the least pretence of any miscarriage in him, and in compliance with the kings pleasure acquiescing in his desired absence from the next parliament he was not without difficulty admitted to appear even by proxy; but this parliament, after having spent the best part of eighteen weeks in forming and prosecuting their complaints against the duke, being dissolved, and public affairs growing daily more and more interesting, when the third parliament was called he determined to maintain the right of his peerage; but the lord keeper *Coventry*, by the kings order, attempting to stop him, if possible, by letter, wherein he signified the king's pleasure to this effect, he conducted the matter so that the peers called for his assistance, whereupon he gave his attendance, and in the course of the session he opposed the loan demanded of the subject contrary to the laws: and two sermons having been preached before the king by Dr. *Manwaring*, one of his chaplains, which were published by his majesty's special command, wherein he attempted to establish an absolute power in the king, with active and passive obedience in the subject, upon pain of damnation, he with great strength of argument exposed the fallacious reasoning of this court sycophant. He likewise strenuously supported the petition of right; and the king having, in order to defeat it, sent his letter to the lords containing in appearance sundry concessions, by judicious observations and sound reasons he shewed that the same were conceived in such general and ambiguous terms that they left to the subject no security of enjoying their liberty and the laws; whereupon these concessions were waved as unsatisfactory.

Eckard, after setting forth the various illegal and violent measures taken by the court to enforce the loan, and mentioning the removal of Sir *Randolph Crew* from the place of lord chief justice, by reason of shewing himself dissatisfied with it, and the appointment of Sir

Nicholas

Nicholas Hide, a creature of the duke in his stead, says "The politic bishop of *Lincoln* could not wholly escape in this critical juncture; who delivering his thoughts concerning the loan, a complaint was sent up to the lords of the council, and upon this occasion an information of other pretended matters was afterwards preferred against him in the star-chamber;" and afterwards, that all the spiritual and temporal lords about *London* being invited to the grand solemnity of baptizing the kings first born son, "only the declining bishop of *Lincoln* was design- edly omitted; which with great uneasiness caused him to ask the reason of the earl of *Holland*; who freely told him, *That he must expect worse than this, because he was such a champion for the petition of right; that there was no room at the table for those that liked it.*" And in relating the proceedings of the government in the year 1637, after mentioning the severe censures of Dr. *Bastwick* and others, which occasioned great disgust, he writes thus. "Before these last proceedings were fully finished there came on the famous cause in the star-chamber, against a far greater man, Dr. *Williams*, bishop of *Lincoln*, which had different, tho' no less remarkable effects."—"The king and the arch-bishop had entertained insuperable prejudices against him, and look'd upon him as a dangerous affecter of popularity, and a favourite of the *Puritan* faction."—"The beginning of his troubles arose from Sir *John Lamb* and Dr. *Sibthorp*, who with *Allen* and *Burden*, two proctors, being at dinner with him at *Buckden*, there began a discourse concerning non-conformists. Now the bishop, knowing these to be all active men in the prosecution of them, advised them to abate their severity, for he knew the king would treat them more mildly for the future, being a considerable party that much influenced parliamentary affairs; adding further, *That the King had communicated this to him with his own mouth.* A few years after, upon some difference with the bishop, Sir *John Lamb* and Dr. *Sibthorp* informed against him in the star-chamber for revealing the kings secrets. But the information being either not well laid, or sufficiently supported, the bishop, by evasions, and delays, found means to fence against it for some years together; but with great vexation and expense. In the mean time the displeasure of the court encreased against him, so that he was daily

“ put to some new trouble, and not suffered to have any rest. This
 “ caused him to apply himself to the lord *Cottington*, and beg to
 “ know how he might procure his peace, and such ordinary favours as other
 “ bishops had from his majesty. That lord advised him to two things, to
 “ resign his deanery of *Westminster*, and to restrain his great and magni-
 “ ficent way of living ; both which he refused, the former out of good
 “ reason, and the latter out of a resolute temper.

“ At length *Kilvert*, a proctor in the *Arches*, a person very scandalous
 “ and cunning, who before had been employed in hunting *Bennet*, a cor-
 “ rupt judge in the *prerogative*, to his final sentence, was retained by
 “ some great men to prosecute this bishop to the like confusion. This
 “ man having found by diligent enquiry, and subtle practices, that the
 “ bishops purgation depended chiefly upon one *Prigeon*, the register of
 “ the court of *Lincoln*, he made it his chief business by discrediting the
 “ witnesses to invalidate his evidence, and so laid a bastard to his charge,
 “ there appearing a sufficient ground for an indictment against him. The
 “ bishop apprehending himself under a necessity to support the reputa-
 “ tion of *Prigeon*, engaged himself more zealously than was thought
 “ consistent with the dignity of so great a prelate for so inconsiderable
 “ a man. He was at a vast expense to ward off the blow, and the
 “ fathering of the bastard was bandied between *Prigeon* and one *Booth*
 “ from session to session, and from one year to another, till the mother
 “ of the child was found to have been tampered with by some of the
 “ bishops creatures to charge it wholly upon *Booth*, who, when it was
 “ too late, actually owned himself to be the true father. On the dis-
 “ covery of which practice *Kilvert* let go his former hold, and exhibited
 “ a new bill against the bishop for *tampering with the kings witnesses*, a
 “ crime most proper for the star-chamber. The bishop finding himself
 “ plunged into new difficulties, and under the weight of a merciless
 “ persecution, endeavoured to obtain a composition with the king, be-
 “ ing willing to pay four, and then eight thousand pounds to purchase
 “ his own peace, and his majesty's favour ; which tho' for a while ac-
 “ cepted of, afterwards was urged against him, as a proof of his con-
 “ sciousness and guilt of the crime charged upon him.

“ About

July 11,
1637.

“ About the middle of *July* the cause came to a full hearing, which
 “ held nine days debate, with an extraordinary concourse of people,
 “ who highly pitied the bishop, as a man marked out for a sacrifice to
 “ the court, and one who was like to bleed in his purse towards a de-
 “ signed war against *Scotland*. In conclusion he was condemned to ten
 “ thousand pounds fine to the king, a thousand marks to Sir *John Moun-*
 “ *son*, who was concerned against *Prigeon*, suspension in the high com-
 “ mission [b] from all office and benefice, and imprisonment during his
 “ majestys pleasure. All this was executed without the least abatement;
 “ and *Walker* his secretary, *Powell* his steward, and one *Land*, were
 “ severally fined, and ordered to be imprisoned: but they all escaped
 “ both fine and imprisonment, which were in a short time commuted
 “ into such other offices as they were to do for *Kilvert* against their
 “ master, as he soon found to his new perplexity and damage: for after
 “ the bishop had been imprisoned in the tower, and had his goods to a
 “ vast value shamefully wasted by *Kilvert* at *Buckden*, in the rifling of
 “ his papers, *Powel* found a letter writ to him about five years before,
 “ by Mr. *Osbaldston* the school-master of *Westminster*, in which there
 “ were some enigmatical expressions, which were thought highly reflect-
 “ ing upon the archbishop and the then lord treasurer *Weston*. This be-
 “ ing produced *Kilvert* took the advantage, and exhibited a new bill
 “ against him for *divulging scandalous libels against privy-counsellors*. The
 “ bishop denied that ever he had received the letter, but it being found
 “ in a box in his chamber, with another paper that seemed fully to ex-
 “ plain it, he was condemned in another fine of eight thousand pounds.”
 According to *Rushworth* the sentence of the court was, “ That the
 “ bishop of *Lincoln* should be fined in £. 5000 to the king, and £. 3000
 “ to the archbishop; to be imprisoned during the king’s pleasure, and
 “ to make submission.” By force of the preceding sentences he con-
 tinued a prisoner in the tower until the 16th of November 1640, when,
Rushworth says, he “ was sent for to take his place in the house of lords,

[b] He was sentenced to pay a fine of £ 10000 to the king, to be imprisoned in the tower during his majestys pleasure, and to be suspended from all his ecclesiastical functions, both *ab officio & beneficio*, and was referred to the high commission court to censure him as they should think fit concerning his degrees, as particularly appears in *Rushworth*.

“ his majesty having by a gracious message signified that it should be so,
 “ without an enquiry into, or repetition of, what had formerly passed.
 “ For there being much business to be done his majesty was willing there
 “ should be a full house.” The bishop being restored to his seat in parliament, it is needless to say that he was able fully to represent the manifold grievous oppressions which he had suffered from the court of star-chamber; but it may be remembered that the archbishop in giving judgment against him, in July 1637, cited several parts of the *civil* law, and from the *canon* law divers councils, with the decretals, in support of it.

1640-1.

On the 22d of *Feb.* Mr. *Rigby* reported “ from the committee for
 “ high commission and star-chamber court the case of Dr. *Bastwick*;
 “ whereupon it was resolved, That the precept made by the archbishop
 “ of *Canterbury* and others, high commissioners for causes ecclesiastical
 “ within the realm of *England*, for the apprehending of the body of Dr.
 “ *Bastwick*, and in searching for and seizing his books; and the messengers acting thereupon in searching Dr. *Bastwick's* house, and seizing his books and papers, are against law, and the liberty of the subject.”

“ Resolved &c. That the sentence given against Dr. *Bastwick* by the
 “ high commissioners, and the proceedings whereupon that sentence is
 “ grounded, and the execution of that sentence, are against law; and
 “ that the sentence is void, and that Dr. *Bastwick* ought to be restored to
 “ the exercise and practice of physic, and to have reparation and recompense for his damage and loss, sustained by the said sentence and execution.”

“ Resolved &c. That all those several commissioners of the high-commission court, which voted against Dr. *Bastwick* in the sentence pronounced against him, ought to give satisfaction to Dr. *Bastwick*.

The House afterwards resumed the debate concerning Dr. *Bastwick*; whereupon it was further

“ Resolved &c. That the proceedings against Dr. *Bastwick* [in the
 “ court of Star-chamber] are against the law and the liberty of the subject, as also the sentence against him ought to be reversed, the fine of
 “ £.5000 discharged, and he to have reparation for his losses and sufferings.”

“ Resolved

“ Resolved &c. That the orders and warrants from the council-board
 “ for Dr. *Bastwicks* exile, and transferring from the castle of *Lanceston*
 “ to the isle of *Scilly*, and his imprisonment there, are against the law
 “ and liberty of the subject, and that he ought to have reparation for his
 “ losses and damages sustained by those orders, and that imprison-
 “ ment [c].”

On the 5th of March 1640 Lord *Andover* made the following speech.

“ My Lords,
 “ Since your lordships have already looked so far into privileges of
 “ peers as to make a strict inquisition upon foreign honours, let us not
 “ destroy That among ourselves which we desire to preserve from
 “ strangers.”

“ And if this grievance I shall move against have slept til now, it is
 “ very considerable, lest custom make it every day more apparent than
 “ other. Your lordships very well know that there was a statute framed,
 “ 3 *Hen. VII.* authorizing the chancellor, treasurer, and privy seal, and
 “ the two chief justices, calling to them one bishop, and a temporal
 “ lord of the kings council; to receive complaints upon bill or infor-
 “ mation, and cite such parties to appear as stand accused of any misde-
 “ meanor; and this was the infancy of the star-chamber: but after-
 “ wards the star-chamber was, by cardinal *Wolsey*, 8 *Hen. VIII.* raised to
 “ mans estate; from whence (being now altogether unlimited) it is
 “ grown a monster, and will hourly produce worse effects, unless it be
 “ reduced by that hand which laid the foundation; for the statutes
 “ which are ratified by parliament admit of no other than a repeal.
 “ Therefore I offer humbly to your lordships these ensuing reasons why it
 “ should be repealed.”

“ First, The very words of the statute clearly shew that it was a *need-*
 “ *less institution*; for it says, They who are to judge, can proceed with
 “ no delinquent otherwise than if he were convicted of the same crime
 “ by due process of law. And do your lordships hold this a rational court,

[c] *Rushworths Collec.* vol. iv. p. 193. and *State Tryals*, vol. i. p. 482.

“ that sends us to the law, and calls us to the law, and calls us back
 “ from it again ?”

“ Secondly, Divers judicatories confound one another, *et in pessima*
 “ *republica plurimæ leges.*”

“ The third reason is from circumstance, or rather *à consuetudine* ;
 “ and of this there are many examples both domestic and foreign ; but
 “ more particularly by the parliaments of *France*, abbreviated into a
 “ standing committee by *Philip* the king, and continued according to his
 “ institution until *Lewis XI* came to the crown ; who being a subtle
 “ prince, buried the volume in the epitome ; for to this day, whenever
 “ the three estates are called, either at the death of the old king, or to
 “ crown the new, it is a common proverb, *allons voire le feu des estats* :
 “ My lords, arbitrary judgments destroy the common laws, and in them
 “ the two great charters of the kingdom ; which being once lost we have
 “ nothing left but the name of liberty.”

“ Then the last reason is (though it was the first cause of my standing
 “ up) the great eclipse it hath ever been to the whole nobility ; for
 “ who are so frequently vexed there as peers and noblemen ? and not-
 “ withstanding their appeal to this assembly is ever good, whilst that
 “ famous law, of 4 *Edw. III.* remains in force, for the holding of a par-
 “ liament once a year, or more, if occasion require ; yet who durst a
 “ year ago mention such a statute, without incurring the danger of Mr.
 “ *Kilverts* persecution ? Therefore I shall humbly move your lordships,
 “ That a select committee of a few may be named, to consider of the
 “ act of parliament itself ; and if they shall think it of as great pre-
 “ judice as I do, that then the house of commons, in the most usual
 “ manner, may be made acquainted with it, either by bill or conference,
 “ who also haply think it a burden to the subject ; and so when the
 “ whole body of parliament shall join in one supplication, I am confident
 “ his majesty will desire that nothing shall remain in force which his
 “ people do not willingly obey [*d*].”

[*d*] *Rushworths Collect.* vol. iv. p. 204.

On the 12th of March, Mr. *Rigby* reported the case of Mr. *Burton*; whereupon it was “ Resolved, That the four commissioners, Dr. *Duck*, “ Dr. *Worral*, Dr. *Sams*, and Dr. *Wood*, proceeded unjustly and illegally “ in suspending Mr. *Burton* *ab officio* & *beneficio*, for not appearing upon “ the summons the first process.”

“ Secondly, That the breaking up Mr. *Burtons* house, and arresting “ his person without any cause shewed, and before any suit depended “ against him in the star-chamber, and his close imprisonment thereupon, “ are against the law and liberty of the subject.”

“ Thirdly, that *John Wragg* hath offended in searching and seizing “ the books and papers of Mr. *Burton*, by colour of a general warrant “ dormant from the high commissioners; and that the said warrant is “ against law, and the liberty of the subject; and that serjeant *Dendy*, “ and alderman *Abel* have offended in breaking open the house of Mr. “ *Burton*, and ought respectively to make him reparations for the “ same.”

“ Resolved, That Mr. *Burton* ought to have reparation and recom- “ pense for damages sustained by the aforesaid proceedings from Dr. “ *Duck*, &c.”

“ Resolved, That the warrant from the council-board, dated at *White- “ ball*, Feb. 2, 1636, for the committing Mr. *Burton* close prisoner, and “ the commitment thereupon, is illegal, and contrary to the liberty of “ the subject.”

“ Resolved, That the archbishop of *Canterbury*, bishop of *London*, “ and the earl of *Arundel*, the earl of *Pembroke*, Sir *Henry Vane*, secre- “ tary *Cooke*, and secretary *Windebank*, do make reparation to Mr. “ *Burton* for his damages sustained by this imprisonment [e].”

And on the 24th of March, “ The business of Mr. *Burton* coming “ again into consideration, it was resolved, That the sentence in the “ star-chamber against Mr. *Burton* is illegal, and without any just “ ground, and ought to be reversed, and he ought to be freed from the “ fine of £. 5000, and imprisonment, imposed by the said sentence,

[e] *Rushworths Collect.* vel. iv. p. 207.

“ and

“ and to be restored to his degrees taken in the university, orders in the
 “ ministry, and to his ecclesiastical benefice in Friday-street, *London*.”

“ That the order of the council-board for transferring the said Mr.
 “ *Burton* from the castle of *Lancaster*, to the isle of *Guernsey*, and imprison-
 “ ing him there, are against the law and liberty of the subject. That the
 “ said Mr. *Burton* ought to have reparation and recompense for the
 “ damages sustained by the said imprisonment, loss of his ears, and other
 “ evils sustained by the said unjust and illegal proceedings [*f*].”

On the 20th of April a report being made in Mr. *Prynns* case it was
 resolved upon the question,

“ 1. That the sentence against Mr. *Prynn* in the star-chamber, Febru-
 “ ary 17, anno 9 *Car.* is illegal, and given without just cause, and ought
 “ to be reversed; and that Mr. *Prynn* ought to be discharged of the fine
 “ of £. 5000 imposed by the said sentence, and of all extents thereupon,
 “ and of his imprisonment, decreed by that sentence.”

“ 2. Resolved That Mr. *Prynn* ought to be restored to his degrees in
 “ the university of *Oxford*, and to the society of *Lincolns-inn*, and to the
 “ exercise of his profession of an utter barrister at law, and to his chamber
 “ again at *Lincolns-inn*.”

“ 3. Resolved, That Mr. *Prynn* ought to have reparation for such
 “ damages and prejudice as he hath sustained by the said sentence and
 “ proceedings.”

“ 4. Resolved &c. That the sentence given against Mr. *Prynn* in the
 “ the star-chamber, 14 *Junii* 1637. Anno 13 *Car.* is illegal, and given
 “ without any just cause, and therefore ought to be reversed; and that
 “ he ought to be discharged of the fine and imprisonment thereby de-
 “ creed; and that he ought to have reparation and recompense for the
 “ damages sustained by that sentence, and the execution thereof.”

“ 5. That the warrant, dated 27 Aug. 13 *Car.* for the transportation
 “ of Mr. *Prynn* from *Carnarvan* castle to the isle of *Jersey*, and his im-
 “ prisonment there, and other restraints therein mentioned, are against
 “ the law and liberty of the subject; and that he ought to be discharged

[*f*] *Id. ibid.* p. 213.

“ of that imprisonment, and to have reparations for the damages sustained thereby.”

“ 6. Resolved, &c. That the imprisonment of Mr. *Prynn* by a warrant, dated 1st Feb. 1632, under the hands of *Thomas* lord *Coventry*, lord keeper of the great seal of *England*, *Richard* lord archbishop of *York*, *Henry* earl of *Manchester*, *Edward* earl of *Dorset*, *Henry* lord viscount *Faulkland*, *William* lord bishop of *London*, *Edward* lord *Newburgh*, and Sir *Thomas Jermin*, is unjust and illegal, and that they ought to give Mr. *Prynn* satisfaction for the damages sustained by his imprisonment.”

“ It was further ordered, That a charge be drawn up against Dr. *Heylin* touching the promoting the suit in star-chamber against Mr. *Prynn* [g].”

Besides the petitions aforementioned Dr. *Alexander Leighton*, a Scotch divine, on the 7th of November 1640, presented his petition to the house of commons, complaining of the severe proceedings against him in the star-chamber, for writing a book entitled, “ An Appeal to the Parliament, or A Plea against Prelacy,” whereupon the proper orders were given touching the prosecution of this complaint; and on the 21st of April Mr. *Rouse* having reported his case, it was resolved upon the question,

“ 1. That the attacking, imprisoning and detaining Dr. *Leighton* in prison, by warrant from the high commissioners, is illegal.”

“ 2. Resolved, &c. That the breaking up of Dr. *Leightons* house, and the taking away his papers by *Edward Wright*, then sheriff of *London*, and now lord mayor, is illegal.”

“ 3. Resolved, &c. That the said *Edward Wright*, then sheriff, and now lord mayor of *London*, ought to give reparations to Dr. *Leighton* for his damages sustained by the breaking open his house, and taking away his papers and other goods, as aforesaid.”

“ 4. Resolved, &c. That the archbishop of *Canterbury*, then bishop of *London*, ought to give satisfaction to Dr. *Leighton* for his damages sustained by fifteen weeks imprisonment in *Newgate*, upon the said bishops warrant.”

“ 5. Resolved, &c. That the great fine of £. 10000 laid upon Dr. *Leighton*, by sentence in the star-chamber, is illegal.”

“ 6. Resolved, &c. That the sentence of corporal punishment imposed upon Dr. *Leighton*, the whipping, branding, fliting the nose, cutting off his ears, setting in the pillory, and the execution thereof, and imprisonment thereupon, are illegal.”

“ 7. Resolved, &c. That Dr. *Leighton* ought to be freed from the great fine of £. 10000, and from the sentence of perpetual imprisonment, and to have his bonds delivered to him, which he entered into for his true imprisonment.”

“ 8. Resolved, &c. That Dr. *Leighton* ought to have good satisfaction and reparation for his great sufferings and damages sustained by the illegal sentences in the star-chamber [b].”

John Lilburne, close prisoner in the fleet, likewise, on the 7th of November 1640, presented his petition to the house of commons, complaining of the proceedings against him in the star-chamber in February 1637-8, for printing and publishing of libellous and seditious books, intituled, “*News from Ipswich, &c.*” contrary to a decree of that court made in July preceding, to prohibit the printing of books without license, to this effect,

“ That none shall presume to print any book or pamphlet whatsoever, unless the same be first licensed, with all the titles, epistles and prefaces therewith imprinted, by the lord archbishop of *Canterbury*, or the bishop of *London* for the time being, or by their appointment, and within the limits of either university, by the chancellor or vice-chancellor thereof, upon pain that every printer so offending shall for ever thereafter be disabled to exercise the art of printing, and shall suffer such further punishment as by this court, or the high-commission, shall be thought fitting ; that before any books imported from foreign parts shall be exposed to sale, a true catalogue thereof shall be presented to the archbishop of *Canterbury*, or the bishop of *London* : And that no officers of the custom shall deliver any foreign books out of their hands and custody, before those bishops shall have appointed one of their

[b] *Rushworths Collect.* vol. iv. p. 228, 229.

“ chaplains, or some other learned man, with the master and wardens
 “ of the company of stationers, or one of them, to be present at the
 “ opening of the pack and fardels, and to view the same. And those
 “ that disobey this injunction are to be censured in this or the high-
 “ commission court, as the several causes shall require. And if in this
 “ search there happen to be found any schismatical or offensive books,
 “ they shall be brought to the aforesaid bishops, or the high-commission
 “ office, that the offenders may be punished. That no person whatso-
 “ ever shall imprint in the parts beyond the sea, or import from thence,
 “ any English books, or whereof the greater part is *English*, whether
 “ formerly printed or not. And that no books whatsoever shall be re-
 “ printed, though formerly licensed, without a new license first obtained,
 “ upon pain of like censure and punishment. And that if any person
 “ whatsoever, that is not an allowed printer, shall presume to set up a
 “ press for printing, or work at any such press, or set and compose letters
 “ for the same, he shall be set in the pillory, and whipt through the city
 “ of *London* [i].’

Here we find the court of star-chamber, in manifest derogation of
 the legislative authority of the kingdom, and in open violation of the
 rights of the subject, making laws restrictive, or rather subversive of
 civil and religious liberty, with severe penal sanctions, according to their
 sovereign will, subjecting offenders against them to punishment at the dis-
 cretion of this court, or of the high-commission, without limitation of
 nature or number; and what severities their discretion dictated we have
 in some measure shewn.

Upon the prosecution of *Lilburne* he was ordered to be examined,
 upon interrogatories, touching the matters charged upon him; and being
 brought up to the office for examination he refused to take an oath to
 answer interrogatories, saying it was the oath *ex officio*, and that no free-
 born *Englishman* ought to take it, not being bound by the law to accuse
 himself. And afterwards, upon the 9th of February, peremptorily re-
 fusing to take the oath tendered to him in open court, he was remanded
 to the fleet, to remain close prisoner until he should take his oath, and

[i] *Rusbworths Collect.* vol. iv. p. 463, 464.

be examined. And it was by the court declared that unless he should submit to take the oath, and be examined, by a certain appointed time, their lordships would on the last sitting of the term proceed to censure him for his contempt. And on the 13th of the same month appearing again in court, the attorney general informed their lordships that he had obstinately continued his refusal, and moved them to pass censure upon him for his contempt; whereupon their lordships endeavoured to persuade him to conform, offering then to accept his oath, without proceeding to censure; but still persisting in his refusal to take the oath proposed, “ the whole court did with unanimous consent declare and adjudge the
 “ said *Lilburne* guilty of a very high contempt and offence, of danger-
 “ ous consequence and evil example, and worthy to undergo a very sharp,
 “ severe, and exemplary censure, which might deter others from the
 “ like presumptuous boldness in refusing to take a legal oath, without
 “ which many grievous and exorbitant offences, to the prejudice and
 “ danger of his majesty, his kingdoms and loving subjects, might go
 “ away undiscovered and unpunished.” And therefore their lordships decreed that he should be remanded to the fleet, there to remain til he should obey the orders of the court, and pay a fine of £. 500 to his majestys use; and before his enlargement to become bound with good sureties for his good behaviour; and the more to deter others from offending in the like kind, they further decreed that he should be whipt from the prison of the fleet to the pillory, to be erected when and where they should direct; and that he should be set in the pillory, and from thence be returned to the fleet, there to remain according to their decree.

On the 18th of April following, in execution of this sentence, he was severely whipt from the fleet to *Westminster*: During his whipping and standing in the pillory he uttered many bold speeches against the tyranny of bishops, &c. and when his head was in the pillory he scattered among the people sundry copies of pamphlets, said to be seditious, of which the court of star-chamber, then sitting, being informed they immediately ordered him to be gagged during the residue of the time appointed for his standing in the pillory, which was accordingly done; upon which he stamped with his feet, thereby intimating to the beholders, as *Rush-*

worth

worth supposes, he would still speak were his mouth at liberty; and on the same day the court of star-chamber made the following order.

“Whereas *John Lilburne*, prisoner in the fleet, by sentence in star-chamber, did this day suffer condign punishment for his several offences, by whipping at a cart, and standing in the pillory, and (as their lordships were this day informed) during the time that his body was under the said execution, audaciously and wickedly, not only uttered sundry scandalous and seditious speeches, but likewise scattered sundry copies of seditious books amongst the people that beheld the said execution, for which very thing, amongst other offences of like nature, he had been censured in the said court by the aforesaid sentence. It was thereupon ordered by their lordships that the said *Lilburne* should be laid alone with irons on his hands and legs in the wards of the fleet, where the basest and meanest sort of prisoners are used to be put, and that the warden of the fleet take special care to hinder the resort of any person whatsoever unto him, and particularly that he be not supplied with any hand, and that he take special notice of all letters, writings, and books brought unto him, and seize and deliver the same unto their lordships; and take notice from time to time who they be that resort to the said prison to visit the said *Lilburne*, or to speak with him, and inform the board [k].” And on that day their lordships made this farther order.

“That his majestys attorney and sollicitor general be hereby prayed and required to take strict examination of *John Lilburne*, prisoner in the fleet, touching the demeanour and speeches of him the said *Lilburne* during the time of his whipping and standing in the pillory this day, according to sentence of his majestys court of star-chamber, particularly, whether the said *Lilburne* did at that time utter any speeches tending to sedition, or to the dishonour of the said court of star-chamber, or any member of the said court? And whether he did throw about and disperse at the same time any seditious pamphlets and books, either of that sort for which he was formerly censured, or any other of the like nature? What the speeches were, and who heard

[k] *Rushworth*, vol. ii. p. 466.

“them.

“ them ? What the said books were, and whence, and of whom the said
 “ *Lilburne* had them ? And what other material circumstances they
 “ shall think fit to examine either the said *Lilburne* upon, or any other
 “ person by whom they shall think good to inform themselves for the
 “ better finding out the truth : and thereupon to make certificate to the
 “ board what they find, together with their opinions [l].”

Lilburne having for some time lain with double irons on his hands and feet in the inner wards of the prison, a fire happened near the place in which he was close confined, which gave a jealousy that in his fury and anguish of pain he was desperate, and had set the prison on fire, not regarding himself to be burnt with it : the neighbouring inhabitants without the fleet, and the prisoners within all cried, *release Lilburne, or we shall all be burnt* ; whereupon they run headlong, and made the warden remove him out of his hold, and the fire was quenched, and he remained a prisoner in a place where he had some more air. He continued in prison to the time of presenting his petition, when it was ordered, “ That he should have liberty, by warrant of this house, to go
 “ abroad in safe custody, to prosecute his petition exhibited here ; and
 “ that he be removed out of the common prison where now he is, into
 “ some more convenient place, and have the liberty of the fleet [m].”

The house of commons conceiving *John Lilburnes* case proper for the consideration of the house of lords, they transmitted the same to their lordships, who after all proper proceedings, made the following order thereupon.

“ Whereas the cause of *John Lilburne* gent. came this day to a hear-
 “ ing at the bar, by his counsel, being transmitted from the house of
 “ commons, concerning a sentence pronounced against him in the star-
 “ chamber Feb. 13th *Anno 13 Car. regis* ; and after an examination of
 “ the whole proceedings, and a due consideration of the said sentence,
 “ it is this day adjudged, ordered, and determined by the lords in par-
 “ liament assembled, that the said sentence, and all proceedings there-
 “ upon, shall forthwith be for ever totally vacuated, obliterated, and
 “ taken off the file in all courts where they are yet remaining, as illegal,

[l] *Rushworth*, vol. ii. p. 467.

[m] *Id.* vol. iv. p. 20.

“ and most unjust, against the liberty of the subject, and the law of the
 “ land, and *magna charta*, and unfit to continue upon record; and that
 “ the said *Lilburne* shall be for ever absolutely freed, and totally dis-
 “ charged from the said sentence, and all proceedings thereupon, as fully
 “ and amply as though never any such thing had been. And that all
 “ estreats and process in the courts of exchequer for levying of any
 “ fine (if any such be) shall be wholly cancelled and made void, any
 “ thing to the contrary in any wise notwithstanding.”

John Brown, Cler. Parliament [n].

On the 4th of May 1641, Mr. *Rouse* reported the case of *John Lilburne*, whereupon it was,

“ 1. Resolved, That the sentence in the star-chamber given against
 “ *John Lilburne* is illegal, and against the liberty of the subject, and
 “ also bloody, wicked, cruel [o], and tyrannical.”

“ 2. Resolved, That reparation ought to be given to Mr. *Lilburne* for
 “ his imprisonment, suffering, and losses, sustained by that illegal sen-
 “ tence [p].”

Lord *Clarendon* gives the following account of the proceedings in par-
 liament for abolishing the court of star-chamber.

“ A bill for taking away the star-chamber court. The progress of
 “ which bill was this. The exorbitances of this court had been such
 “ (as hath been before touched) that there were very few persons of
 “ quality who had not suffered, or been perplexed, by the weight or

[n] *Rushworth*, vol. ii. p. 469.

[o] On the hearing before the Lords it was said that, “ close imprisonment was never used
 “ to the primitive christians by any tyrant; for then that heavy charge in Scripture, *I was in*
 “ *prison, and ye visited me not*, might be answered; but a close imprisonment may presume a
 “ famishment, and so death. The *Romans* had four punishments, *lapidatio, combustio, decolla-*
 “ *tio*, and *strangulatio*; but never famishing to death. This man might have been so, as it
 “ was sworn.”

“ Three years imprisonment till the parliament released him, and might otherwise have been
 “ for ever.” *Rushworth*, vol. ii. p. 468.

[p] *Id.* vol. iv. p. 250.

“ fear

“ fear of those censures and judgments. For having extended their ju-
 “ risdiction from riots, perjury, and the most notorious misdemeanors,
 “ to an asserting all proclamations and orders of state; to the vindica-
 “ ting illegal commissions, and grants of monopolies (all which were
 “ the chief ground-works of their late proceedings) no man could hope
 “ to be longer free from the inquisition of that court than he resolved
 “ to submit to those, and the like extraordinary courses. And therefore
 “ there was an entire inclination to limit and regulate the proceedings
 “ of that court, to which purpose a bill was brought in, and twice
 “ read, and, according to custom, committed. It being returned after
 “ by the committee, and the amendments read, it was suddenly sug-
 “ gested (by a person not at all enclined to confusion, or to the violent
 “ party that intended that confusion) *that the remedies provided by that*
 “ *bill were not proportionable to the diseases; that the usurpations of that*
 “ *court were not less in the forms of their proceedings than in the matter*
 “ *upon which they proceeded; insomuch that the course of the court (which*
 “ *is the rule of their judging) was so much corrupted, that the grievance*
 “ *was as much thereby, in those cases of which they had a proper connu-*
 “ *sance, as it was by their excess in holding pleas of that in which, in truth,*
 “ *they had no jurisdiction; and therefore he conceived the proper and most*
 “ *natural cure for that mischief would be utterly to abolish that court,*
 “ *which it was very difficult, if not impossible, to regulate; and in place*
 “ *thereof to erect and establish such a jurisdiction as might be thought ne-*
 “ *cessary.* Hereupon the same bill was recommitted, with direction, *so*
 “ *far to alter the frame of it as might serve utterly to take away and abolish*
 “ *that court;* which was accordingly done, and again brought to the
 “ house, and ingrossed, and sent up to the lords. So that important
 “ bill was never read but once in the house of commons, and was never
 “ committed; which, I believe, was never before heard of in parlia-
 “ ment [q].”

In order to ascertain those proceedings in the house of commons which
 concluded in passing “ A bill for the regulating of the privy-council,

[q] History of the Rebellion, vol. i. p. 222.

“ and for taking away the court commonly called the star-chamber,” we shall state the material parts as they stand in the journal.

1^{ma}. *vice lecta est billa*. “ An act for declaring and regulating the power of the star-chamber and council-table.”

1641.
Mar. 26.

1^{ma}. *vice lecta est billa*. “ An act for reforming of the unlawful acts and proceedings of the privy-council, and court, called the star-chamber.”

30

2^{da}. *vice lecta est billa*. “ An act for the reforming of the unlawful proceedings of the privy council, and court commonly called the star-chamber, upon question committed unto the committee for the star-chamber: and are to meet to morrow.”

April 1st.

2. “ Ordered. That the committee for the bill of the star-chamber shall have power to take the other bill concerning the star-chamber, which has been once read, out of the house, and to take it into consideration with the other bill, and out of both to make one, and present it to the house.”

“ Ordered. That the bill of star-chamber, high commission court and pluralities be reported on Thursday morning next.”

18

And after several subsequent similar orders,

“ Mr. *Prideaux* reports the bill concerning the star-chamber, and the council-board, with the amendments: the which amendments were twice read, and, upon question, ordered to be ingrossed [r].”

May 31st

3^{tia}. *vice lecta est billa*. “ An act for the regulating the council table, and taking away the court commonly called the star-chamber; and, upon question, passed.”

June 8 post
meridm.

“ Mr. *Hampden* appointed to carry up these bills following to the lords,”

9.

“ An act for regulating the council table, and taking away the court commonly called the star-chamber.”

“ An act &c.”

“ Mr. *Prideaux* reports the bill of star-chamber returned from the lords at a conference by a select committee of both houses.”

June 28.
p. meridm.

[r] *Rushworth* says that on this day a bill for quite taking away the jurisdiction of the star-chamber was read.

P

“ Resolved,

1641.

“ Resolved, upon the question, instead of the word, *henceforth*, shall be inserted, *after the 1st. day of August*, in all three places.”

“ The amendments and additions and provisoes, were all twice read, and committed to Mr. *Selden*, Mr. *Prideaux*, Mr. *Maynard*, Sir *Tho. Widdrington*, Mr. *Glyn*, Mr. *Hill*, Mr. *Perd*, Mr. *Cage*, Mr. *Rigby*, Serj^t. *Wilde*, Sir *John Colpepper*, Mr. *Bagshaw*, Mr. *Pierpoint*, Mr. *Pelham*, Sir *Rob^t. Harley*, and are to meet this afternoon at six of the clock in the court of wards.”

29th.
p. merid^m.

“ Mr. *Prideaux* reports the bill concerning the council-board, and star chamber, returned from the lords at a conference, with some additions, provisoes, and alterations, the which were here read, and afterwards committed.”

“ Resolved, upon the question, that these words, *in any other court or courts whatsoever*, shall be presented to the lords at a conference.”

“ In the 5th. addition, and in the 4th. line, after the word, *whatsoever*, that the clause there following may be omitted wholly, and this clause added instead thereof, viz. *unless in such causes where, by the statutes of this realm, they have power and authority to commit or imprison; and that in the warrant for such commitment, imprisonment or restraint the true cause thereof be so expressed, as the courts to which the same shall be returned may well judge thereof.*”

30th.

“ The order made yesterday for resuming the consideration of the bills concerning the star-chamber and high commission was read.”

“ And the house accordingly proceeded with the amendments to these bills returned from the lords and the Committee.”

July aft.
ante meri-
d^m.

“ The lords by message desire a present conference by a committee of both houses presently in the painted chamber, if it may stand with the convenience of this house, concerning the bill of the star-chamber,”

post meri-
d^m.

“ Mr. *Prideaux* reports the amendments returned from the lords at a second conference to the bill concerning the star-chamber and council board.”

* * * * *

“ Resolved, upon the question, That neither the body of the lords of the council, nor any one of them in particular, as a privy counsellor,

“ fellow, has any power to imprison any free born subject, except in
“ such cases as they are warranted by the statutes of the realm.” 1641.

“ Sir John Hotbam went up with a message to the lords, to desire a
“ free conference by a committee of the whole house presently, if it may
“ stand with their conveniency, concerning the bill of star-chamber;
“ and council-board. Brings answer that their lordships will give a
“ present meeting by a committee of the whole house as is desired.”

“ The amendments, additions and provisoes to the bill concerning the
“ star-chamber, now brought from the lords, were twice read, and upon
“ question assented to; and the bill ordered to be amended accordingly.
“ And, upon a second question, the provisoes were ordered to be in-
“ grossed.” July 2 p.
meridiem.

“ The amendments, additions and provisoes to the bill concerning the
“ high commission, now brought from the lords, were twice read, and,
“ upon question assented unto; and the bill ordered to be amended
“ accordingly. And upon a second question the provisoes were ordered
“ to be ingrossed.”

“ 3^{tia}. *vice lecta*. The amendments and provisoes to the star-chamber
“ bill were read in the ingrossed copy; and upon the question assented
“ unto.” 3d.

“ 3^{tia}. *vice lecta*. The amendments and additions of the bill concern-
“ ing the high commission were read, and upon question assented unto,
“ and passed.”

“ A message from the lords by Mr. Attorney and Mr. Serj^t. Finch.”

“ The lords command this message to be sent in writing (which was
“ first read by Mr. attorney, and then delivered to Mr. speaker, *in hæc*
“ *verba*) *The king hath been moved upon the desire of both houses by some*
“ *lords for his royal assent unto the three bills sent up this morning. That*
“ *his majesty will come this morning, and give his royal assent unto the bill*
“ *which concerns raising of monies for disbanding the armies, for the present*
“ *ease of the kingdom: that in regard his majesty hath not been acquainted*
“ *with the particulars of the other two bills he will advise of them until*
“ *Tuesday next; and then will give his answer.*”

“ Lord Falkland is appointed to go to the lords with this message.”

“ To acquaint their lordships that this house has taken into consideration their lordships message ; and do conceive that the passing of the two bills concerning the star-chamber and high commission, will much expedition to the levying of monies appointed to be raised by the act for raising of monies for disbanding the armies &c. and therefore to desire their lordships that his majesty may be moved to give the royal assent to them all three together with all convenient speed.”

On the 5th his majesty gave the royal assent to these two bills.

In order to complete the history of the proceedings in the house of commons relative to the court of star-chamber, I shall here set forth the following particulars not inserted in their proper place.

“ November 7th. [1640] The first petition which was preferred and read in the house, was that of *Susannah Bastwick* ; and afterwards, another of *Sarah Burton*, on the behalf of their respective husbands, close prisoners in remote islands ; complaining of the severe sentence of the court of star-chamber, inflicted upon them in the pillory ; and that the petitioners, their wives, were by particular order not to be permitted to come and visit their husbands. Whereupon the house ordered, *That their said husbands shall be forthwith sent for to the parliament, in safe custody, by warrant of this house, directed to the governors of the isles where they are prisoners, and to the captains of the castles there ; and that the cause of their detainer may be certified hither also.*”

“ The next petition preferred was that of *John Brown*, a servant to Mr. *Prynn*, close prisoner in the isle of *Jersey*, complaining of the sentence in the star-chamber against his master, and the cruel putting it in execution ; and of his banishment to a remote island ; desiring the house would send for his master, more fully to make known his case : and the house made the like order for him as was made for Dr. *Bastwick* [5].”

From what preceeds it is evident that the house of commons had under their consideration the legal and assumed jurisdiction of the court of star-

[5] *Rushworth*, vol. iv. p. 20.

chamber, with its great and manifold abuses, from the 7th. of November 1640, to the begining of July following, during which time, by themselves and their various committees, one of which, without speaking of the rest, was composed, with other persons, of men whose consummate learning and profound knowledge of law and government, with other abilities, have been seldom equalled in this or any other kingdom, they received the petitions of the parties aggrieved, gave proper orders for their liberation, and every thing requisite for the support of their petitions, considered the certificates of their imprisonment, with their causes, heard the petitioners in person, or by counsel, examined their witnesses and papers, and inspected the records of the enormous proceedings and decrees of this court, making the most diligent and strict enquiry into the verity and nature of all those facts which upon full consideration were with great reason held to be the proper grounds of its dissolution; and in their proceeding by bill to declare and regulate the power of the star-chamber and council-table, and by another bill to reform their unlawful acts and proceedings; and by a third, formed of them, which in its progress was rendered effectual, for regulating the privy council, and taking away the court of star-chamber, governing themselves with great deliberation and advisement; and in proper season conferring from time to time with the lords, whereby they united their wisdom with their own; so that, notwithstanding lord *Clarendons* representation, this law was no precipitate act of the state, or of the house of commons in particular, but the fruit of a patient hearing of all proper parties, a careful examination, mature consideration, and consequent knowledge of all its subject matters, and necessary to the restoration of legal liberty and equal justice, the chief ends of all good government.

An intelligent friend informs me that the records and papers which belonged to this court are no where to be found, being destroyed, as he supposes, to prevent their proving to posterity the particulars of all those grievances which these judges imposed on their fellow subjects, under colour and in the name of public justice, founding their decrees on their passions, their arbitrary wills, foreign laws, *civil* or *canon*, or on any thing rather than the proper principles of law, equity, or humanity; and whose

whose cruelty seems to have wanted nothing to complete it but the power and use of torture, the usual companion of the *civil* law.

On repeated enquiry, I have to my surprize found that the rack or brake, brought into the tower by the duke of *Exeter* for a beginning of the *civil* laws, intended to be introduced by him, the duke of *Suffolk*, and others, is still remaining there : and upon considering that so long as the kingdom endures innocent persons will be liable to imprisonment there, thro' the appearance of guilt, the conspiracy of others, or their public virtue exerted for the advancement of the common-weal, or to preserve it from the dictates of bold ambition, the baneful influence or misconduct of ministers unequal to their places, or to punish and extirpate peculation and corruption, that fell destroyer of free states, for which, though more dangerous than the sword of our enemies, numerous advocates have with so great effrontery contended, which ministers have in times past with impunity practiced, and which being promoted by those who ought as far as possible to prevent it, by its diffusion, polutes the land with bribery, perjury, fraud, drunkenness and idleness, thereby sap-ping the foundation of the state, as the great political architects in all ages have, for our warning, with united voice declared—that the more these men of noble minds are wanted, the more danger will attend the vigorous exercise of their virtues ; and when in consequence thereof they find themselves confined in the same place with that horrid instrument of torture to which the innocent have been so often subjected, this may occasion such apprehensions as every sincere lover of liberty and justice would willingly prevent—that the mildness and excellence of the *English* constitution and government have augmented the state in numbers, wealth and strength, and given to its members that spirit which renders them invincible. Sir *Thomas Smith*, after applauding the magnanimity of the *English* nation, and censuring the torment or question used by order of the *civil* law, and custom of other countries, as incompatible with it, says. “ The nature of our nation is free, stout of heart, prodigal of life
 “ and blood : but contumely, beating, servitude, and servile torment and
 “ punishment it will not abide. So in this nature and fashion our an-
 “ cient princes and *legislators* have nourished them as to make them stout-
 “ hearted

“hearted, courageous, and soldiers, not villains and slaves; and that is the scope almost of all our policy [t].”—that the design formed by the duke of *Exeter*, and duke of *Suffolk*, the queens great favorite, and others, of introducing the *civil* laws, with the actual bringing in of the rack for a beginning, by the completion whereof the *English* government would have been changed, and its dignity diminished, the freedom of the people subverted, and their bodies subjected to dire tortures, was apparently, in my opinion, treason against the common-wealth; and yet these great offenders, who thus conspired to take away the common right, and best inheritance of all their fellow subjects; and supplanting the law of liberty, equity, safety, and mercy, to debase and enslave the whole kingdom, were suffered to go unquestioned, instead of being duely punished for this atrocious crime—that the reign of a mild prince being the proper season for destroying every instrument of intended public cruelty, under favour, and a firm persuasion that this, which was placed in the tower, in order to be employed as the mean of inflicting such excruciating torments upon the *English* subjects, is abhorrent to his majestys humane disposition, as well as odious to his people, I would humbly submit to proper consideration that this horrid instrument, instead of continuing an object of terror in the capital prison of a free country, be publicly burned, in honour to the mildness of his majestys government, and the freedom of his subjects from all torture.

Our enquiry into the nature, proceedings, and abolition of the court of star-chamber hath, I presume, clearly shewn that the resolutions of that court, which were intended to form, and have been supposed to contain a complete body of laws touching libels, are void of all proper authority, so that they cannot be enforced on the subject as law in any sense whatever, yet I cannot forbear saying that it hath ever appeared strange to me that lawyers bred up in the regular study and knowledge of the great and fundamental laws of the land, and in just admiration of their wisdom and equity, and of those impartial and judicious explications which, consonant to their spirit and intent, the sages of the law have made for

[t] Common-wealth of *England*, B. ii. ch. 27.

the public utility, in those times wherein the streams of justice flowed free and pure, being unpolluted and unrestrained by the hand of power, should through inadvertence acknowledge, or with solicitude contend for, the decisions given in the star-chamber by a collection of courtiers devoted to the pleasure of princes of arbitrary dispositions as good authorities, and in effect laws, at this day. And, in order to prove that the arbitrary measures of king *James*, supported by his council, who under different appellations served him for the purposes of advice and enforcement thereof, were advanced to a dangerous excess before those resolutions were formed in the great case of *L. P.* whose authority I oppose, I desire that, besides the other matters before mentioned, it may be particularly remembered that these resolutions were made in *Easter* term, in the third year of the reign of king *James*, and that on the 17th. day of October preceding the proclamation or letters patent afore-mentioned were issued respecting tobacco imported, by which the king assumed the power of imposing what duties he pleased, of subjecting the goods of the merchants to forfeiture, and them to such pecuniary penalties, and corporal punishments as their high offence in not conforming to his command should deserve; thereby subjecting the merchants to such excessive fines as the court of star-chamber should in their discretion think fit; and moreover to such various, indignant and cruel corporal punishments as that court should from time to time in their wonted severity be enclined to inflict. For my own part I know no language equal to the malignity of this proceeding of king *James*, who by this single act of despotism violated the rights of his subjects in their goods, monies, and bodies, subjecting those respectable and useful men the merchants of *England*, on their disobedience to his lawless commands, to such ignominious punishments as are unfit to be mentioned with their names, hereby manifesting his injurious notions respecting his monarchic authority, his lust of unlimited power, and the contempt and dishonour in which he held the rights, liberties, and people of this kingdom.

Notwithstanding that upon due examination it appears that the two star-chamber cases so often referred to long since lost their authority, I shall proceed to consider the matter contained in them so far as relates to

to the principal proposition, after taking notice of the two cases mentioned by lord *Coke*, which happened in the reign of *Edward III.* The record or report of the former is imperfect, and therefore it would not serve for a proper foundation whereon to rest an enquiry into the nature of libels against private persons, in case that was my present purpose: but, after bearing my feeble testimony against those who prostitute their pens, or the press to promote their injurious designs, I desire it may be remembered that my concern is not with contests between private persons, or their consequent treatment of each other, the amount of that general proposition which I would support as beneficial to the public being only this, “ That matters of public concernment are the proper “ objects of public knowledge.” There is a great and manifest difference between these and the other in their nature, relations and consequences. Upon the case of *John de Northampton* it may be observed, (1) that being an attorney of the court of king’s bench, he stood in a special relation to the judges; and as all duties are the consequents of the relations of the parties, they seem to have considered him as having acted an improper part, inconsistent with his duty to them, and to have proceeded against him accordingly. 2. The matter charged upon him, I apprehend, was insufficient to constitute a crime in any common person. He did not charge the justices with having done any thing illegal, or improper; but said, that neither the chief justice, nor his fellows, would do any great thing by the command of the king or queen more than of any other of the realm. By the oath of the justices made in the same year wherein this proceeding was had, it was, among other things, provided that they should well and lawfully serve their lord the king, and his people, in the office of justice, and do equal law and execution of right to all his subjects rich and poor, without having regard to any person, to the kings letters, or any other mans, or to any other cause. And the words of this attorney might, I conceive, have been considered as matter of undesigned commendation rather than censure of the judges, who being properly left to the free exercise of their judgment, it ought to be presumed that they would fully and freely discharge their duty to the king and his people in every point, upon which no great thing could remain to be done in virtue of the kings command, in its nature im-

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proper as well as needless. 3. By the judgment of the court it was declared, first, that the letter contained no truth, that is, in effect, saying that they would do a great thing by the kings command. Secondly, that this letter might cause the kings indignation to arise against the court and his justices, which would be to their scandal. Now, with all due reverence to the memory of these learned judges, in my humble opinion, it would have been more for the honour of this magnanimous prince, under whom the kingdom so greatly flourished in laws and arms, to have presumed that his indignation was not to be incited against this honourable court by this general, idle, and impertinent letter; written by a forward, conceited, and petulant attorney practising in it; and these fears of possible royal resentment appear to be but a weak foundation of a judgment given for committing a subject to prison: however, these judges being strangers to the star-chamber severities, they probably soon discharged him, upon giving sureties for his good behaviour.

And now we shall in course consider those resolutions of the court of star-chamber which contravene a free enquiry into public affairs; and all businesses being what those who manage them make them, this enquiry of necessity comprises the managers with the matters. The chief of these resolutions is the fourth in number in the first case, and is thus expressed. "It is not material whether the libel be true, or whether the party against whom it is made be of good or ill fame." These words, I apprehend, contain such a proscription of truth, and the provision of such a sanctuary for weak and wicked men, who, through the unhappy mistakes of princes, the power and prejudice of ministers, or the combination, or other influence of the Great, who sometimes scruple not to make their country a convenience to themselves, their adherents and dependents, sustain public offices, as are inconsistent with the just liberty and safety of a free people, and would in effect, under some princes, fix an indelible character on their unqualified ministers and their partisans. But we shall proceed to the examination of the reason assigned for this twofold resolution, to wit, "for in a settled state of government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise." This proposed equivalent

valent of the pen and the press will by no means supply their place; they are profitably employed upon the nature and foundation of human government, the excellence and defects of their various forms, the particular constitution of the state of which the author is a member, with the means of its perfection and preservation; and in monarchies limited and tempered by laws, in giving their best assistance for clearly distinguishing and preserving the just boundaries between the princes prerogative and the peoples liberty, both being necessary to the common good; in the examination and representation of the nature and condition of the several parts of an extended empire, and their mutual interests and relations, with the relations of the whole to other states; in considering the wisdom, propriety, and utility of laws, or their defects through mistakes in their formation, or the mutability of human affairs; and, as the preservation of a free state greatly depends on the manners and customs of its members, in pointing out to those who are willing to save their country, and bless their posterity, such manners and customs as are beneficial or prejudicial to their safety and lasting happiness; in preventing the abuses of authority or liberty, so that the former may not run into power and tyranny, or the latter into licentiousness; and in promoting the knowledge of truth, the common friend of all, with every thing that may tend to the advancement of the common weal; and, after examining, with freedom, propriety, and care, public measures, and the merits or demerits of public persons, bringing all to the proper test, that perpetual law, which being made in heaven cannot be repealed on earth, SALUS POPULI SUPREMA LEX ESTO.

The star-chamber reason for their resolution hath no relation to the use of writing in these or any similar cases, which differ so widely from those personal injuries that may be redressed by known standing laws in the established courts of justice. And, in support of the claim made to the free use of writing upon public affairs, I shall endeavour to evince its farther utility, by considering the conduct of some of those princes who restrained it, with the benefits that might have resulted from its permission. The most glorious empire had by numerous conquests been formed and extended from *Rome* by its policy and arms, the several parts being gradually and firmly connected with each other, and with the mother

city, the center of the whole, and the heart of this great body politic: but *Constantine*, moved by the vanity of being the founder of a new city, broke up that noble and compact political structure, which wisdom accompanying the the extension of the empire had formed, and time had improved, strengthened, and rendered most convenient, by his removal of the seat of empire to *Byzantium*, which he adorned with the spoils of many cities. After this he made bare the principal borders of the empire, drawing off the legions, and placing them in the provinces, where they became effeminate. Now let us suppose that sundry persons possessed of the true *Roman* spirit, had in virtue of the liberty of writing freely, in language equal to so great occasions, challenged his attention, exposed his policy, and, in effect, roundly told him that by his intended division of the capital, and the removal of the seat of power to so great a distance from the more warlike nations, it would become impracticable to collect and distribute the forces of the empire for its best protection; whereby the whole would be weakened, and *Rome*, the mistress of the world, not only dishonoured, but in time brought into danger of falling into the arms of barbarians—that instead of a body politic, revered by all nations for its grandeur and excellence, he was going to form a double-headed monster, and that truth being mighty above all things, posterity would consider him as the destroyer of the most renowned empire, rather than the founder of a city; this plain dealing, notwithstanding the wonted violence of mean ambition, might possibly have checked this emperour in the career of his vanity, and inciting wiser counsels prevented his mispending his time and his treasure upon this vain-glorious and injurious project. And afterwards in strong terms declaring that by his departure from the former wise policy, in drawing away the legions from the banks of the great rivers, and distributing them in the provinces, the empire would be laid open to the incursions of barbarians, and the soldiers, who were its defence, enervated by the pleasures of the circus and the theatre, whereby the state would be still farther weakened and endangered, this might have occasioned better consideration, and contributed to secure the borders. And again, when the partiality and personal regard of this emperour for his favorites were such that he gave them too great authority, and, though he knew their in-

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justice, could not prevail upon himself to punish them, if he had been told that by this proceeding he sacrificed his own honour, and the welfare of his subjects to the support of men, who, instead of being favoured with his protection, ought to feel the weight of his indignation, and that he who does not restrain the known injuries of his servants does in effect commit them, this might have caused a change in his conduct, and prevented so deep a stain from being for ever fixed on that character which he was so solicitous to raise and preserve. Though surnamed the *Great*, this proceeding was inconsistent with all true grandeur, and clearly shewed that the reason by him assigned for his second and fourth edicts against libels was illusory and vain, to wit, that the writers of what he deemed libels should openly accuse the persons mentioned in them.

The edict of *Theodosius the Great*, so full of dignity, clemency and favourable regard for the freedom of speech and writing, with the equitable conduct which at length took place of indignant wrath, may atone in some measure for his intended severe treatment of the city of *Antioch*; but in case he had some years before published this edict, through the indulgence therein contained, he might have been told that it was essential to justice that punishments should be proportionate to offences—that the offence committed by a part of the inhabitants, in casting down the statues of the empress, could by no means warrant the destruction of the first city in the world, with the distress, and dispersion of all persons remaining in it, after many who were innocent had suffered death together with the guilty in expiation of this offence.—That the regal law under which the emperours claimed all the authority and power of the people, as containing their concession thereof, could never be intended for the destruction, but for the preservation of cities, and that if he executed his purpose, instead of being considered as a great and good prince, all ages and nations would severely censure this cruel proceeding. These interesting and plain truths might have roused the dormant humanity of this emperour, and so prevented this great city from continuing so long under the terrible apprehensions of utter extirpation; and moreover they might possibly have prevented that horrid cruelty which he exercised on another occasion. The inhabitants of *Thessalonica* having in a sedition slain one of his lieutenant generals, he abandoned the whole city to the mercy of
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his soldiers, who slew fifteen thousand persons before they were fated with blood, involving the innocent in the same condition with the guilty.

The most learned persons differing in their opinions touching the motives that induced *Theodosius* to publish this remarkable edict, I desire leave to mention my own conjecture, that he was in some measure influenced herein by the oration of *Latinus Pacatus*. This orator being sent from *Gaul* to *Rome*, to congratulate *Theodosius* upon his victory obtained over the tyrant *Maximus*, on the first of September, in the year 391, according to the account of the best chronologers, he pronounced his oration, addressed to the emperor in the senate; when, after saying many things, he spake thus.

“ Who could compare himself to us in calamity? We sustained the
 “ tyrant alone, and in conjunction with others. Not to mention the
 “ utter desolation of cities, desarts filled with fugitive nobles, or the con-
 “ fiscation of the effects of persons who had sustained the highest hon-
 “ ours, themselves put on a level with the vulgar, and a price set on
 “ their heads, we have seen dignities debased, men of consular dignity
 “ despoiled of their robes, old men surviving their fortunes, and the la-
 “ mentable security of infants sporting even under the sequestrator,
 “ while at the same time though miserable we were forbid to appear
 “ wretched, yea we were even compelled to feign ourselves happy;
 “ and having at home, and in secret, entrusted to our wives and children
 “ alone the furtive grief, we went abroad with a countenance not suiting
 “ our fortune. For you would hear an informer say, why does that man
 “ appear sad? Is it because he is reduced from riches to poverty? Why
 “ is he not thankful that he lives? Why appears this man abroad in
 “ mourning? He laments, I suppose, a brother; but he hath a son.
 “ Thus we were not permitted to bewail what was lost, through fear of
 “ what remained. We therefore veiled our cloudy minds with serene
 “ countenances, and, like those who having tasted the juice of *Sardoan*
 “ grass are said to smile in death, when over-whelmed with sorrow we
 “ personated the chearful. It is some alleviation of calamities to give
 “ tears to our evils, and to relax the breast with sighs. There is no
 “ greater punishment than to be miserable without being suffered to ap-
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“ pear so. At the same time there was no hope of satisfying the spoiler;
 “ for satiety did not, as is natural, follow abundance, the eager desire of
 “ having daily encreased, and what was procured did but irritate the
 “ rage of obtaining. As drink encreaseth the thirst of sick persons; as
 “ fire is not smothered but encreased by dry fuel; so the riches accu-
 “ mulated by the public impoverishment, served only to stimulate the
 “ greediness of the hungry mind [u].”

And now taking leave of the *Romans*, and coming to *England*, the notoriety of the times wherein the free and proper use of writing upon public affairs might have been beneficial to prince and people, who can have no true separate interests, will in a great measure render these particular examinations unnecessary, which, by reason of their nature and number, would at present be impracticable; nevertheless it may briefly be observed that in the reigns of *Henry VI.* and *Edward IV.* reproachful words, idle prophecies, calculates of nativity, rhimes and ballads, spoken and made of the king, were prosecuted and punished as treason; and in the beginning of the reign of this latter prince the law of treason was so far extended that one *Walter Walker*, a citizen and grocer of *London*, was executed in *Smithfield* as a traitor, for having said that he would make his son heir to the crown, meaning the sign of the crown in *Cheap-*

[u] § 25. Quis se nobis calamitate contulerit? Tyrannum & cum aliis tulimus, & soli. Quid ergo referam vacuatas municipibus suis civitates, impletas fugitivis nobilibus solitudines? Quid perfunctorum honoribus summis virorum bona publicata, capita diminuta, vitam ære taxata? Vidimus redactas in numerum dignitates, & exutos trabeis consulares, & senes fortunarum superstites, & infantium sub ipso sectore ludentium flendam securitatem; cum interim miseri vetabamur agere miseros; imo etiam cogebamur mentiri beatos; & cum domi atque secreto solis conjugibus ac liberis credidissemus furtivum dolorem, procedebamus in publicum non nostræ fortunæ vultu. Audires enim dicere delatorem. Quid ita ille tristis incedit? An quia pauper ex divite est? Non enim se vivere gratulatur? Quid ita hic publicum atratus incesstat? Luget, credo, fratrem. Sed habet filium. Ita fieri non licebat amissa, metu reliquorum. Serenos ergo nubilis mentibus vultus induebamur, & ad illorum vicem qui degustato Sardorum gramine succo feruntur in morte ridere, imitabamur læta mœrentes. Est aliquod calamitatum delinimentum dedisse lacrymas malis, & pectus laxasse suspiriis. Nulla major est pœna quam esse miserum, nec videri. Spes inter hæc nulla prædonis explendi. Nec enim, ut natura fert, copiam satiety sequebatur, crescebat indies habendi fames, & parandi rabiem parta irritabant. Ut ægrorum sitim potus accendit, ut ignis arentibus non obruitur, sed augetur, ita coactæ publica egestate divitiæ aviditatem jejunæ mentis acuebant.

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side. This putting of an innocent man to death for a meer jest was an act of tyranny, accompanied with such prostitution of public justice as greatly dishonoured the jurisprudence of the kingdom. And although I would by no means attempt to justify or excuse opprobrious or indecent words spoken or written of the king, in prose or verse; yet I am wholly unable to reconcile the various prosecutions and punishments for the other offences, which took place in the reign of *Henry VI.* with the law of the land, or with that impunity which was vouchsafed to the dukes of *Exeter* and *Suffolk*, and others, with respect to their atrocious crime in bringing in the rack for a beginning of the *civil* laws. All bodies politic, as well as natural, are indued with the principle of self-preservation, and this principle, I presume, is inherent in every individual considered in his social as well as natural state; and therefore I conceive that every man when he found that these audacious offenders, encouraged by the assurance of that royal favour which they abused, had actually begun their intended subversion of the common laws and liberties of the kingdom, which were so well suited to the genius and disposition of its inhabitants, through the enjoyment whereof it had so greatly flourished; and that, instead of the former safety touching his life, limbs, and estate, the whole was now to be subjected to a new regimen, and to unknown difficulties, distress and danger, had good reason, in order to his preservation in common with others, by words or writing to censure the injurious proceeding and designs of these public persons, and make every such representation of the nature and consequences thereof as might tend to obviate this impending calamity; and it is possible that a full, clear and decent representation of the great unfitness and danger of those councils, connections and dependances that took place in this princes court might have alarmed the chief parties, and prevented the tragical effects of the conduct of an imperious intriguing queen, who by her insidious arts having obtained the sole command, after destroying the kings friends, governing by her passions, embroiled the whole kingdom, in consequence whereof the king lost his liberty and his life, being the last prince of the house of *Lancaster*, which had made the greatest figure in *Europe*.

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The avarice of *Henry VII.* was so insatiate, that, if the star-chamber court had not existed, and writing freely had been allowed, the ablest pens, I conceive, could not have checked it; for having obtained the unjust and injurious act aforesaid, by force whereof *Empson* and *Dudley*, and such justices of peace (corrupt men) as they caused to be authorized, during so many years, committed most grievous and heavy exactions and oppressions, he continued to receive the fruit of the whole, by these and other like oppressions and injustice collecting vast treasures; so that lord *Coke*, in his chapter of Wards and Liveries, says, “by the close roll in “anno 3 *Hen. VIII.* it appeareth that the king left in his coffers fifty “and three hundred thousand pounds, most part in foreign coin, which “in those days was not of least value.” *Qui facit per alterum facit per se*; and these oppressions being committed and enforced in the name, by the authority, and to the use of the king, he was the oppressor: but although greedy avarice, supported by an unjust law, was regardless of these grievances; yet a true and proper public representation of the state of the distressed, with a thorough examination into the nature of that injurious act, which was the source of their sufferings, might have occasioned such a just and general consideration of the whole matter as in its consequences would have caused a repeal of this act by the parliament in being, or on failure thereof have influenced the kingdom to chuse such representatives as having better knowledge and greater regard for fundamental laws, natural justice and equity, and being animated with true public spirit, would have examined with diligence into these manifold grievances, and frustrating and avoiding all the arts, influence and management of this subtle prince and his agents, would have prevented this oppressive act from continuing in force til after his death.

Constantine the Great by his failing to punish the injustice of those to whom he gave too great authority has to this day suffered in his memory, although it was never suggested that he availed himself in the least measure of their misdeeds, where as the greatest genius, being more inclined to adulation and palliation than to a strict observance of truth, the soul of history, hath bestowed upon *Henry* great and unworthy commendation. This historian speaking of the parliament held in the third year of this kings reign, says that according to the lord chancellors admonition there

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were that parliament divers excellent laws ordained concerning the points which the king recommended ; first the authority of the star chamber which before subsisted by the ancient common laws of the realm, was confirmed in certain cases ; and after relating the particulars of the suffering of Sir *William Stanley*, who had saved the kings life, and set the crown upon his head, he writes thus, “ the fall of this great man, being
 “ in so high authority and favour (as was thought) with the king ; and
 “ the manner of carriage of the business, as if there had been secret
 “ inquisition upon him for a great time before ; and the cause for which
 “ he suffered, which was little more than for saying in effect, that the
 “ title of *York* was better than the title of *Lancaster*, which was the case
 “ almost of every man (at the least in opinion) was matter of great terror
 “ amongst all the kings servants and subjects ; inso much as no man almost
 “ thought himself secure, and men durst scarce commune or talk one
 “ with another, but there was a general diffidence every where : which
 “ nevertheless made the king rather more absolute than more safe. For
 “ bleeding inwards, and shut vapours, strangle soonest, and oppress most.”
 “ Hereupon presently came forth swarms and volies of libels (which
 “ are the gusts of liberty of speech restrained, and the females of sedi-
 “ tion) containing bitter invectives and slanders against the king, and
 “ some of the council : for the contriving and dispersing whereof (after
 “ great diligence of enquiry) five mean persons were caught up and
 “ executed.” And coming to the twenty third year of his reign he
 writes as follows, “ And hearing also of the bitter cries of his people
 “ against the oppressions of *Dudley* and *Empson*, and their complices,
 “ partly by devout persons about him, and partly by public sermons
 “ (the preachers doing their duty therein) he was touched with great
 “ remorse for the same. Nevertheless *Empson* and *Dudley*, though they
 “ could not but hear of these scruples in the kings conscience ; yet, as
 “ if the kings soul and his money were in several offices, that the one
 “ was not to intermeddle with the other, went on with as great rage
 “ as ever. For the same 23d. year was there a sharp prosecution against
 “ Sir *William Capel* now the second time ; and this was for matters of
 “ misgovernment in his mayoralty ; the great matter being that in some
 “ payments he had taken knowledge of false monies, and did not his
 “ diligence

“ diligence to examine and beat it out who were the offenders. For this
 “ and some other things laid to his charge he was condemned to pay
 “ £ 2000; and being a man of stomach, and hardened by his former
 “ troubles, refused to pay a mite, and helike used some untoward speeches
 “ of the proceedings, for which he was sent to the tower, and there
 “ remained til the kings death. *Knesworth* likewise, that had been
 “ lately mayor of *London*, and both his sheriffs, were for abuses in their
 “ offices questioned, and imprisoned, and delivered, upon £ 1000 paid.
 “ *Harwis*, an Alderman of *London*, was put in trouble, and died with
 “ thought and anguish, before his business came to an end. Sir *Lawrence*
 “ *Ailmer*, who had likewise been mayor of *London*, and his two sheriffs,
 “ were put to the fine of £ 1000. And Sir *Lawrence* for refusing to make
 “ payment, was committed to prison, where he stayed til *Empson* himself
 “ was committed in his place.”

Nevertheless he begins this princes character in these words. “ This
 “ king (to speak of him in terms equal to his deserving) was one of the
 “ best sort of wonders; a wonder for wise men. He had parts both in his
 “ virtues and his fortune not so fit for a common place, as for observa-
 “ tion. Certainly he was religious, both in his affection and obser-
 “ vance.”

The state prosecutions and punishments in this reign, and in the reigns
 of *Henry VI.* and *Edward IV.* wherein writings and words criminal,
 and even innocent, were perverted or aggravated and enhanced into treason,
 and matters were brought to such a pass, that, using the words of king
Henry IV. to his first parliament, it may be said, that “ no man knew,
 “ as he ought to know, how to do, speak, or say, for doubt of the pains
 “ of treason,” shew the necessity of adhering to a certain boundary of this
 great crime, and “ how dangerous it is by construction and analogy to
 “ make treasons where the law [25 *Edward III.*] has not done it; for
 “ such a method admits of no limits or bounds, but runs as far as the
 “ wit and invention of accusers, and the odiousness and detestation of
 “ persons accused will carry men [*w*].”

Notwithstanding the notoriety of that great love that king *Henry VIII.*
 had of power and profusion, the parliament which he convened in the

[*w*] *Hales* pleas of the Crown, Part I. Ch. 11.

thirty-first year of his reign were so devoted to his will that they passed an act in these words.

“ The king for the time being, with the advice of his council, or the
 “ more part of them, may set forth proclamations under such penalties
 “ and pains as to him and them shall seem necessary, which shall be
 “ observed as though they were made by act of parliament; but this
 “ shall not be prejudicial to any persons inheritance, offices, liberties,
 “ goods, chattels, or life; and whosoever shall willingly offend any
 “ article contained in the said proclamation, shall pay such forfeitures,
 “ or be so long imprisoned as shall be expressed in the said proclamation;
 “ and if any offending will depart the realm, to the intent he will not
 “ answer his said offence, he shall be adjudged a traitor.”

Certain words [x] spoken or written of the king had some years before been made treason; but by this act he was enabled, with the advice of the more part of his council, to create new offences, in word writing or deed, at his pleasure. The grant of so large a portion of despotic power to the king was so great and manifest a breach of the constitution of the kingdom, made by those who were under the highest obligations to do their utmost to preserve it, as would fully prove, if it were wanted, the fallibility of parliaments, and the utility of writing freely for their sakes, or rather for the sake of their constituents, for whose use they have their political existence, without having recourse to the unconstitutional, dangerous, and injurious acts passed in the reign of *Henry VII*; and what was objected by some public spirited persons in *Scotland* to those acts which ascribed to their king such exorbitant powers, to wit, that they were “ obtained from parliaments by the too great influence
 “ of their monarchs, and the too great pusillanimity of parliaments, who
 “ could not resign the rights and privileges of the people, since they have
 “ no warrant from them for that effect,” might well have been objected to the act which gave the force of laws to the proclamations of the king for the time being.

Coming to the reign of queen *Mary*, let us observe that the *Romish* clergy, when possessed of that plentitude of power which is ever the

[x] To wit, heretic, schismatic, infidel, or usurper of the Crown.

chief object of their desire, have exercised their tyranny without any other bounds or remission than such as might serve to continue or to restore and strengthen it. *Pasce oves* meant *rege mundum*; and their arts and seductions being equal to their manifold oppressions, tyrannizing over the minds, and consequently over the bodies and estates of men, to raise their supreme dominant state they subjected all princes, potentates, states and persons in christendom, and to preserve and enforce their power and their laws they maintained under reverend names innumerable troops at the expense of the princes whom they governed, and the people whom they enslaved; the regulars being the popes standing forces, and the seculars his militia, the former being computed to amount to two millions at least; the cruelties practised by *Christian* princes acting under their influence being chargeable on them, who prostituted the best religion to the worst purposes, and who improving in subtilty and severity, when the voice of truth was heard complaining of these grievances, to secure their tyranny, and silence her, whose invincible arguments, if heard, would overthrow it, devised a new species of cruelty, the prohibition of publishing books without their license. The use of these fetters on the mind, with its noble productions, was adopted by the court of star-chamber, and afterwards by the second, long, or pensionary parliament of king *Charles II*, who by their act passed in the fourteenth year of his reign [y], after prohibiting the printing of any heretical, seditious, schismatical or offensive books or pamphlets, &c. provided that no private persons should print, or cause to be printed, any book or pamphlet, unless the same were first licensed according to the directions therein contained, and that the kings messengers by warrant under his majestys sign manual, or under the hand of one or more of his principal secretaries of state, should have power, with a constable, to take such assistance as they should think needful, and at what time they should think fit to search all houses and shops where they should know, or on probable reason suspect, any books or papers to be printed, bound or stitched, especially printing houses, &c. to view what was there printing &c. and to examine whether the same were licensed &c. with power to seize books imprint-

ing without license, together with the offenders, and to carry them before one or more justices of the peace, to be by them committed to prison, there to remain until tried and acquitted, or convicted and punished; and also provided that in case these searchers should find any books unlicensed which they suspected to contain matters contrary to the doctrine or discipline of the church of *England*, or against the state and government, they should seize upon such books, and carry them to the archbishop of *Canterbury* or bishop of *London*, or to one of the secretaries of state, who should take such further course for their suppression as to them should seem fit; subjecting all printers &c. for the first offence to the disability of exercising their trades for three years, and for the second offence to perpetual disability, with such further punishment by fine, imprisonment, or other corporal punishment, not extending to life or limb, as the justices of the court of kings bench, of oyer and terminer, or of assize, or justices of the peace in their quarter sessions, should think fit to inflict. This act was made to continue in force two years; and by subsequent acts passed in the sixteenth, and in the sixteenth and seventeenth years of this kings reign, it was continued from time to time, and in the seventeenth year it was continued to the end of the first session of the next parliament; so that it expired in the month of May 1679; and by an act passed in the first year of the reign of king *James II* it was revived, and continued for the space of seven years from the 24th. of June 1685.

By this law it is evident the makers of it grafted on the papal stock several severe regulations and penalties nearly affecting the subjects in their habitations, trades, monies, liberties and bodies, devised by the court or themselves. It has been said that they literally followed the principles of archbishop *Laud*, which had caused the troubles in the late reign, and this law evidently corresponds with that assertion. Whether many of them were at this time court pensioners seems to me somewhat doubtful: but of the king it may be said, that about the time of making this act he negotiated with *Lewis XIV.* in order to receive a sum of money “ by way of loan, to assist him in his pressing necessities, which “ would not permit him, without very considerable prejudice, to wait “ the

“ the payment of the gratifications of his parliament,” [z]—that he sold *Dunkirk* to *France* to supply his profusion—that in the early part of his reign he acquiesced in the injurious and dangerous seizure which the *French* king made of *Placentia* in *Newfoundland*—that in the year 1667, by the treaty of *Breda*, he ceded to *France* *Nova Scotia*, the ancient and rightful inheritance of his crown, whose chief value was derived from its relation to the fishery, and which *Cromwel* having by arms restored to the kingdom, *France* by her force or arts could never regain during his usurpation—that in the latter part of his reign he submitted to the notorious encroachment made on a considerable part of the sea-coast of the *American* continent belonging to the *English*, by the *French* king, who in support of this encroachment, and in open defiance of all right and justice, seized and confiscated the *English* fishing vessels at his pleasure; and having during his exile applied himself particularly to navigation, and the building of ships, in which he had made great progress, bishop *Burnet* writes thus, “ His contributing so much to the raising the greatness of *France*, chiefly at sea, was such an error; that it could not flow from want of thought, or of true sense. *Rouvigny* told me he desired that all the methods the *French* took in the increase and conduct of their naval force might be sent him. And, he said, he seemed to study them with concern and zeal. He shewed what errors they committed, and how they ought to be corrected, as if he had been a viceroy to *France*, rather than a king that ought to have watched over and prevented the progress they made, as the greatest of all the mischiefs that could happen to him, or to his people [a].” And in the reign of king *James II.* the *French* king avowed and maintained his encroachments on the *English* fishing ground on the continent, and continued his usurpations upon *Newfoundland*, and the fishery there, without molestation of king *James*, who with his ancestors neglecting to preserve and support the rights of the *English* in this important quarter, the *French* encouraged by their various acquisitions formed in this reign a design of making themselves entire masters of the *American* cod-fishery, which originally of right belonged to the *English*—How far these injurious

[z] *D'Estrades* Letters, Vol. 1st.[a] *History* of his own Time, Vol. i. p. 614.

proceedings required those free expostulations and representations which the trustees of the people had so severely restrained I shall submit to the judicious and impartial reader, without considering the design or attempts of king *James* to subvert the religion liberty and laws of his kingdom, which called for the noblest efforts of the most heroic minds to expose them, and for the effectual prosecution whereof such doctrines touching libels were advanced on the kings behalf, and supported by several of his judges, as by their admission and operation would, I conceive, serve to censure and condemn every writing relative to the state that should be disagreeable to any prince, however innocent or laudable they might be.

But addressing myself again to the ecclesiastic *Roman* emperours, whose tyranny was ever accompanied and strengthened by their confident claim to divine inspiration and infallibility, and whose cruelties were ever exercised in the name of Almighty God, the fountain of all goodness, whose laws are founded in righteousness, justice, equity and mercy, notwithstanding their empire was supported by the most refined policy and such numerous forces, with what was still more powerful, the violent prejudices of the people, at length Truth being introduced by Time, assisted by her intelligent and faithful friends, they, being in some places permitted to appear and act with vigour, and in others through the nobleness of her cause, and the excellence of their fortitude, facing all dangers, and breaking through all restraints, assailed these tyrants with such judgment force and spirit, that they rescued several nations out of bondage, and restored them to the dominion of truth, which makes all men as free as is consistent with their welfare, and shaking this tyranny to its foundations reduced the tyrants to that better conduct which from their plenary establishment they never observed but through necessity; and I presume that knowledge of the truth, to which a free enquiry is requisite, is as necessary to the enjoyment of civil as religious rights. With respect to the passages cited from the Holy Scriptures, they will not support the star-chamber resolution for rejecting the truth, of which they make no mention; but, instead of a tedious and unnecessary discussion of these several passages, after observing that the inhibition to curse the ruler of the people contained in the law of *Moses*, appears to me

me to be of universal and perpetual obligation, the common good of every state requiring that, instead of cursing, the subjects should reverence and honour their chief ruler as far as may be, whose title to this desirable reverence and honour will at all times, I conceive, be best secured by his paternal conduct, I shall in defence of truth adduce the following passages. "Thou camest down also upon mount *Sinai*, and spakest "with them from heaven; and gavest them right judgments, and true "laws, good statutes and commandments." *Nehem*: ix: 13. "By "mercy and truth iniquity is purged." *Prov*. xvi: 6. "Wo unto them "that call evil good, and good evil; that put darkness for light, and "light for darkness; that put bitter for sweet, and sweet for bitter:" *Isaiah* v: 20. "they are not valiant for the truth upon the earth; for "they proceed from evil to evil, and they know not me, saith the "Lord." *Jerem*. ix: 3. "We are sure that the judgment of God is "according to truth." *Rom*. ii: 2. For we can do nothing against the "truth, but for the truth." *2 Cor*. xiii: 8. All free and lawful governments are founded in trust, and frame your government as you please, after completing your politic with the aid of the wisdom and experience of all ages and nations, for its execution it will finally rest in trust. *Donec homines erunt vitia*; and notwithstanding the sacred nature of this trust the histories of all countries too clearly prove that authority is apt to run into power, and power into tyranny; wherefore the use of every mean of preventing this malady is desirable: and one of the chief points of excellence of the *British* constitution consisting in the frequent opportunities which it gives to the people to chuse new trustees, a faithful representation of the conduct of the former, and of the state of the times, which may loudly call for the choice of men of the greatest honour, sense and experience, with such diligence as to delight in examining to the bottom every point of public welfare, without confiding in the representation of others, which may be imperfect, erroneous, or illusory, may excite their serious consideration, with such choice as may suit the occasion, and the noble privilege they enjoy.

From what has been said, with the readers farther reflections, it will, I apprehend, plainly appear that in many cases of great importance the liberty of the press may well be employed in promoting the interests,

preventing the impending mischiefs, or redressing the grievances of public societies, wherein no other means can be pursued to any effect, and in many other cases an assistant to proper measures prosecuted for the advancement of the public welfare; and it is needless to say that these advantages are to be derived from the illustration and maintenance of truth against all opponents; nevertheless, with respect to the star-chamber doctrine, that the truth of a writing prosecuted as a libel is not material, I shall farther observe, 1, that the author of “*The Doctrine of Libels discussed*”, who seems to have searched into all *English* antiquity for precedents of judgments given in violent times, to be produced *in terrorem*; for he adduces several which, by his own confession, are not law at this day, among other things, writes thus in his introduction; “but undoubtedly slanders which might do mischief, [words of great latitude] whether true or false, were punishable by the old common law,” without shewing one precedent or authority for this purpose; and lord *Coke*, or the star-chamber judges, having produced none to this effect, it may be concluded, I conceive, that there are none to be found. 2, that during the existence of the star-chamber court, as well as since, it seems to have been a point fully settled that in actions of slander the defendant might well justify his speaking of the slanderous words charged upon him, by an averment that they were true. 3, that speech and writing are not of contrary natures, but differ only in degree of certainty and permanence, and in the mode of conveying to the intellect the same object of consideration; wherefore I confess it has ever appeared strange to me that the same truth should be lawful when orally delivered, and criminal when reduced into writing. 4. Lord *Coke*, in his 2d. Institute, calls truth the mother of justice; and afterwards he cites, with approbation, this old and excellent rule, *veritas, à quocunque dicitur, a Deo est*. “Truth, by whomsoever spoken, is from God.” 5. that on the tryal of the seven bishops for a libel, in presenting their petition to the king, Mr. justice *Powell*, who by his conduct acquired perpetual honour; after hearing this star-chamber case *de libellis famosis* cited and relied on, and every thing that was possible said for the rejection of truth, as immaterial, spoke thus to the jury. “Gentlemen, to make it a libel it must be false; it must be malicious; and it must tend to sedition.”

The star chamber resolution touching the indifference of truth was suitable to their other conduct, being in effect a law made in their own defence. On the 17th. of October, when sitting at the council-table, they had concurred with the king in that severe and indignant order which he published respecting the merchants importing tobacco; and in Easter term following, when sitting in the court of star-chamber, they made this resolution, whereby they subjected such suffering merchants as should in writing complain of any part of their conduct relative to this illegal proceeding to such farther fines and punishments as they should think fit to impose.

The definition given of a libel in this star-chamber case, so far as relates to the present purpose, without considering the point of falsity, seems rather imperfect, to wit, A scandalous libel *in scriptis* is when a writing is composed or published to the scandal or contumely of another, which words do not necessarily include the evil intent of the writer; but may relate to the casual or undesigned effect of the writing. The definition cited from *Bracton*, and by him taken from *Justinians Institutes*, does not contain the words *dolove malo fecerit quo quid eorum fieret*, which made part of *Justinians* definition. I mention this for the sake of the next point to be considered, the malice of the writer, with its proof, whose place many would supply with presumption. Dr. *Ridley* [b] says “ A famous libel is where a man hath of malicious purpose writ, compounded, or set out any thing to the infamie of another, without a name, or with a name.” Serj^t. *Hawkins* says, “ That a libel in a strict sense is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule [c].”

With respect to the malice of the writer, *Schulting*, in his *Juris prudentia Vetus, Ante-justiniana*, upon the words of *Caius*^a, *aut injuriam fecerit*, explained by the comment of *Aleander*, “ By hand, or words, or writings,” gives the following comment of *Oiselius*. “ Now to do an injury it is required that some of those things which we have spoken

^a *Caii. Instit. lib. ii. tit. 10.*

[b] View of the Civil and Eccles. Law, P. I. Ch. i. Sect. 9.
B. I. Ch. lxxiii. Sect. 1.

[c] Pleas of the Crown,

“ be done for the sake of contumely, and with a desire of doing an injury;
 “ for if an intent to do an injury be wanting it pertaineth not to this
 “ action, Moreover it is also requisite that the person be innocent to
 “ whom the injury is done.” Mr. justice *Holloway*, in the case of the
 seven bishops, observed to the jury that “ the end and intention of every
 “ action is to be considered,” and then applied this rule to their case.
 Sir *George Mackenzie* writes thus, “ He who finds an infamous libel,
 “ and shews it, tho’ to one only, is punishable, if malice or design can
 be proved, else not; for there is nothing more ordinary, nor more inno-
 “ cently done, for the most part, than to shew such libels. Whether
 “ *dolus malus* & *animus injuriandi* (a design to offend) be presumed in
 “ this delict, or must be proved, is much controverted. *Bertaz. consil.*
 “ 237. affirms that it is presumed. *Farin. quæst.* 295. affirms it is not
 “ presumed, but must be proved: and I encline to this last opinion,
 seeing infamous libels are not now so much resented as formerly, custom
 having much allayed the pique which used to ensue thereupon; and that
 “ custom defends from all guilt in this case is most learnedly maintained
 “ by *Coler*, decis. 154. where it was found that stationers were absolved,
 “ though they sold infamous libels, because all stationers use to sell
 “ such [d].” In the case of *Dr. Brown*. Trin. 5. *Annæ B. R.* in an
 information against him for a libel called “ The country parsons advice
 “ to my Lord Keeper,” it was held that an information will lye for
 speaking ironically; “ and Mr. Attorney said ’twas laid to be wrote
 “ *ironicè*, and he ought to have shewed at the trial that he did not
 “ intend to scandalize them; and the jury are judges *quo animo* this was
 “ done, and they have found the ill intent [e].”

With respect to the trial by jury of the party accused of writing a libel, the jurors, I presume, are competent judges of the falsity, malice, and the fact of writing, of the book, pamphlet or paper in question, with its contents. This, I apprehend, corresponds with their original institution. Several learned persons have supposed that trials by jury have taken place in *England* from time immemorial, whereas it seems probable that they were introduced in the time of *Ethelred*, who, according to the *Savillian*

[d] Vol. II. Tit. 30. §. 5.

[e] 11th. Modern. *The Queen v. Brown*.

account,

account, began his reign in the year 979, and died in the year 1016, to whose reign the following ordinance is referred. *In singulis centuriis comitia sunt, atque liberæ conditionis viri duodeni, ætate superiores, una cum præposito sacra tenentes jurento, se adeo virum aliquem innocentem haud damnatos, solumve absoluturos.* Lord Coke cites this ancient record from Lambard, saving the words, *se adeo virum aliquem innocentem haud damnatos, solumve absoluturos.* Mons^r Argot says that about this time the inhabitants of towns and cities in France obtained the privilege of being tried by their peers; this custom being probably begun by the inhabitants of episcopal cities and other free-men. Every crime is the transgression of some law, the judgment whereof necessarily comprizes the law, with the fact; and as all persons are presumed to know the laws, and are therefore punishable for the breach of them, so the jurors when a breach should come in question were presumed to have knowledge suitable to their institution. By the great charter it is provided that no free-man shall be condemned but by lawful judgment of his peers, whereby, in the plainest terms, effectual provision is made that every man when charged with a crime shall be tried by his peers, who have power to condemn or absolve him, this provision being apparently made as well for the commons as the peers of the realm.

The desire of king James to introduce and establish the papal tyranny with his own was so vehement, that he could not brook the noble check which the seven bishops gave to the progress of his superstition and ambition; whereupon the prosecution against them as libellers for having petitioned his majesty in the most decent and proper manner to excuse their non compliance with his illegal command took place; for the maintenance whereof every argument that could be devised was urged. Wright, chief justice, whom Dr. Burnet calls the proper tool of the court, after speaking to the facts relative to the making and publishing their petition, proceeding to enquire whether this petition was a libel, or not, declared to the jury that in his opinion it was a libel, adding that this being a point of law, if his brothers had any thing to say to it, he supposed they would deliver their opinions; and Mr. justice Allybone began his speech thus. “ The single question that falls to my share is to give my sense of this petition, whether it shall be in construction of law a libel in
 2
 “ itself,

“ itself, or a thing of great innocence ;” and after advancing these prepositions, 1, “ that no man can take upon himself to write against the
 “ actual exercise of the government, unless he has leave from the go-
 “ vernment, but he makes a libel, be what he writes true or false.
 “ 2. That no private man can take upon him to write concerning the
 “ government at all ;” and giving his reasons, suitable to his positions, he clearly held this petition to be a libel ; nevertheless not one judge upon the bench questioned the propriety of the juries judging of the whole matter, and giving a general verdict thereupon, though it has of late been publickly insisted that they ought to have found a special verdict, and not taken upon them to determine whether this petition was a libel or not.

In *Busbells* case, 22 *Car.* II. [f], the nature of the trial by jury was thoroughly examined and considered by the court of common pleas, and upon conference with all the judges. Upon a writ of *habeas corpus* issued by that court, on behalf of *Edward Busbell*, and directed to the sheriffs of *London*, they returned that at the court of oyer and terminer, held for the city of *London* at justice hall in the *Old Baily*, he was committed to the goal of *Newgate*, by virtue of an order of that court, whereby it was ordered that a fine of 40 marks should be severally imposed on him and eleven other persons, being the twelve jurors sworn and charged to try several issues joined between the king and *William Penn* and *William Mead*, for certain trespasses, contempts, unlawful assemblies and tumults made and perpetrated by them, together with divers other unknown persons, to the number of three hundred, unlawfully and tumultuously assembled in *Grace-Church-street*, to the disturbance of the peace, whereof the said *Penn* and *Mead* were then indicted, to which indictment they pleaded not guilty ; for that they the said jurors the said *Penn* and *Mead* of the said trespasses &c. contrary to the law of the kingdom, to full and manifest evidence, and to the direction of the court in the matter of law, in court openly given and declared, acquitted, in contempt of the king and his laws, and to the great obstruction of justice, as also to the evil example of all other jurors offending in the like case ;

[f] *Vaughans* Reports.

and

and because the said *Edward* had not paid the fine aforesaid he had til that time been detained in the said goal. “ Upon this return all the judges resolved, That finding against the evidence in court, or direction of the court barely, was no sufficient cause to fine;” and the fine, comitment, and imprisonment in this case being declared illegal, the prisoners were discharged.

According to the course of the law, from the earliest times juries, I conceive, have had it in their power, upon the general issue pleaded, to give a general verdict in civil as well as criminal causes, although matter of law were complicated with the fact. By the stat. of Westm^r.

II. ^a it was “ ordained that the justices assigned to take assizes shall not ^a 13 Edw. I. “ compel the jurors to say precisely whether it be disseisin, or not, so “ that they do shew the truth of the deed, and require aid of the justices. “ But if they of their own head will say that it is disseisin, their verdict “ shall be admitted at their own peril,” *Littleton* ^b says. “ Also in such ^b §. 368. “ case where the enquest may give their verdict at large, if they will take “ upon them the knowledge of the law upon the matter, they may give “ their verdict generally, as is put in their charge;” whereon lord *Coke* comments thus. “ Although the jury, if they will take upon them (as “ *Littleton* here saith) the knowledge of the law, may give a general “ verdict, yet it is dangerous for them so to do; for if they do mistake “ the law they run into the danger of an attain; therefore to find the “ special matter is the safest way, where the case is doubtful.”

Lord chief justice *Vaughan*, to whom, with the other judges, in my poor opinion, the kingdom will ever be obliged, for establishing the right of juries to give general verdicts in criminal causes, as well as to the present lord chief justice of the same court, and the other judges, who have declared general warrants to be illegal, in *Busbells* case, observes that, “ Upon all general issues; as upon not culpable pleaded in trespass, “ *nil debet* in debt, *nul tort*, *nul disseisin* in assize, *ne disturba pas* in *Quare* “ *impedit*, and the like; though it be matter of law whether the defend- “ ant be a trespassor, a debtor, disseisor, or disturber in the particular “ cases in issue; yet the jury find not (as in a special verdict) the fact “ of every case by itself, leaving the law to the court, but find for the “ plaintiff or defendant upon the issue to be tryed, wherein they re- “ solve

“ solve both law and fact complicately, and not the fact by itself;
 “ so as though they answer not singly to the question what is law, yet
 “ they determine the law in all matters where issue is joined, and tried in
 “ the principal case, but where the verdict is special.”

We have in part seen to what great dangers and mischiefs the subjects are exposed when trials by their peers are subverted, and other modes of trial introduced; wherefore it is extremely desirable that trials by jury should ever be equal, fair and free, influenced by truth of fact and argument only; so that, with the assistance of those excellent judges to whose opinions proper regard should be had, they may be as perfect as the nature of human affairs will permit; and to this end, among other wise provisions, to free them from all apprehensions of danger attendant on the discharge of their duty, according to serj^t. *Hawkins*, [g] “ it seemeth
 “ to be certain, That no one is liable to any prosecution whatsoever, in
 “ respect of any verdict given by him in a criminal matter, either upon
 “ a grand or petit jury; for since the safety of the innocent, and punish-
 “ ment of the guilty, doth so much depend upon the fair and upright
 “ proceeding of jurors, it is of the utmost consequence that they should
 “ be as little as possible under the influence of any passion whatsoever.
 “ And therefore, lest they should be biased with the fear of being har-
 “ rassed by a vexatious suit, for acting according to their consciences (the
 “ danger of which might easily be insinuated where powerful men are
 “ warmly engaged in a cause, and thoroughly prepossessed of the justice
 “ of the side which they espouse) the law will not leave any possibility
 “ for a prosecution of this kind. It is true indeed the jurors were for-
 “ merly sometimes questioned in the star-chamber, for their partiality
 “ in finding a manifest offender not guilty; but this was always thought
 “ a very great grievance; and surely as the law is now settled by *Busbells*
 “ case, there is no kind of proceeding against jurors in respect of their
 “ verdicts in criminal matters allowed of at this day.”

The mischiefs of slander consist in its operation on the minds of persons, with their consequent actions; and it seems to me that jurors are well qualified to judge of the whole, especially when assisted by able and

[g] Pleas of the Crown, B. I. Ch. lxxvi. §. 5.

“ impartial

impartial judges. In case a perpetual succession of judges equal to those excellent persons who now sit in the seat of judgment could be secured to the kingdom we might be less solicitous touching this particular: but although through his majestys goodness provision has been made that his own son, or any future successor, shall not have it in his power on his accession to appoint new judges at his pleasure; yet it is possible that future times may produce such men as being devoted to the will of arbitrary princes, or dangerous ministers, shall be ready to use every mean in their power to restrain and punish those writings which may be necessary to expose their designs; and it being difficult in these times of danger to stem the current of those precedents whereof an ill use may be made, the practice of giving general verdicts, I conceive, may contribute to the preservation of the liberty of the press, which hath in times past been so severely restrained by law, or lawless power. *Julius Cæsar* observed that the most dangerous precedents are made in favorable cases, and we have lately seen even office precedents urged with vehemence to warrant the violation of the law of liberty and safety, by men who have since unhappily proved that their caution was not encreased by the correction of their errors.

Notwithstanding the great utility of the liberty of the press it is certainly liable to manifold injurious abuses, sometimes pregnant with great mischiefs; without enumerating others, instead of being helpful to preserve, it may be employed by our enemies to divide and destroy us; wherefore just and proper bounds are to be observed. Every considerate and sincere friend to the freedom of writing laments these abuses perpetrated by the various enemies of the public weal. *Libertas non est licentia* says *Tacitus*, the great friend of liberty, railing is not reasoning, nor are invectives arguments; vague and general reproaches, charges and criminations may injure, provoke, and inflame, but they neither rightly inform, nor reform. The cause of truth and justice is not promoted by obloquy and detraction, the *decus & tutamen* of the common-wealth is not to be assailed by petulance and impertinence; yet, instead of proper examination and representation, such a licentious use of the press hath taken place, that neither the highest public stations, nor the greatest public services, nor public nor private virtues, nor the absence of the

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sufferers,

sufferers, are sufficient guards against these abuses. All personal, provincial and national abuse is the prostitution of the press, and may sometimes produce great and mischievous effects. *Juncta juvant*, and in interesting cases the errors of politicians, with the errors and incentives of pamphleteers, encreased and diffused by that *cacoethes scribendi & male dicendi* which delights in defaming, aggravating and inflaming, instead of duly considering, informing, and composing, and, as the seeds of social as well as natural diseases generate apace, spreading far and wide a political pestilence, prejudice begetting prejudice, and error begetting error, and the whole producing violence, opposition, division and confusion, may, without the co-operation of the dangerous devices suggested by others to effectuate their deep and malignant designs, subject the most powerful state to great difficulties. Of this we have at present an instance so alarming in its nature, and uncertain in its consequences that it calls, in my poor opinion, for the closest examination, and the most calm just and equal consideration, so that being understood in its origin, progress, and present state, all future evils may as far as possible be prevented, for the accomplishment whereof every good subject, I presume, will cheerfully contribute what lies in his power. I need not explain myself by naming the colonies, whose nature, rights, and interests, considered in themselves, and in their connection with their mother country, have been so egregiously misrepresented by numerous public writers in this metropolis, and in the colonies, many of whom have advanced propositions utterly incompatible with the nature of the *British* empire, and subversive of it, some oppugning the supreme authority of the state, and others the just rights of *British* subjects. And having perhaps taken more pains than any of my fellow citizens to understand the nature and rights of colonies, ancient and modern, and of the *English* colonies in particular, so that my defects in point of natural abilities are in some measure supplied by my diligence, I shall in order to illustrate this important subject, with the best intentions for the public service, submit some few things to public consideration, with all due deference to my superiours in every sense, proceeding, as far as may be with convenience, by way of proposition, in order that the truth may be more clearly comprehended, and readily embraced, and my involuntary errors more easily refuted,

refuted, whereby I shall hope to avoid encreasing the number of those who enter and traverse the field of controversy without the direction of any certain principle. All arguments destitute of proper principles are mere empty sophisms; they may captivate and delude, but they can neither duly inform nor promote the public welfare; and yet we daily see writers on both sides of the *Atlantic* proceeding with an air of sufficiency to treat of the political structure of the colonies, or some of its parts, without either knowing or enquiring into its real proper and solid foundation, the right understanding whereof might prevent innumerable mischiefs. Truth is simple and uniform, and ever attended with a happy coincidence of all its parts, whereas error is infinite. And, in order to ascertain the best mode of investigating the truth, thereby cutting off many delusive arguments, I shall cite the excellent rule delivered and maintained by the learned and judicious *Placcius*, viz. *Demonstraturum quid de re aliqua, eandem in perfectissimo gradu considerare debere.* "That
 " he who would demonstrate any thing relative to any subject, ought to consider that in the most perfect degree."

AMERICA, since discovered by the *Europeans*, hath suffered greatly by various political errors; through prejudice, with its consequents injustice and cruelty, *Spain* slew her millions, of whom she might, to the great encrease of her honour, wealth and strength, have made good subjects, or profitable allies. Continuing under the dominion of prejudice, and transferring her pernicious policy to *Europe*, by her injustice and severity she lost the *Netherlands*, and by her manifold breaches of faith, and oppressions, she lost the kingdom of *Portugal*, with all its foreign dominions, every colony, fort and settlement (adhering firmly, as was natural, to their mother country) revolting with her, *Ceuta*, and some of the islands of the *Azores*, garrisoned by *Spanish* soldiers, only excepted. *Spain*, if influenced by the sole dictates of justice and equity, would have preserved the *Americans*, and held the *Netherlands*, with all the dominions of *Portugal*, firmly united to her by the strongest bonds, faith and love, whereby, with suitable policy, she might have raised the most glorious empire, exceeding all modern example, and common conception. Rational liberty, and equal justice, plenty and safety, being the chief ends of all lawful government, the misconduct of *Spain*, with its consequences,

quences, will, to all ages and nations, irresistably prove against a thousand authors who join hand in hand to countenance dark devices, and promote iniquity, that the principle of universal felicitation is the best mean of preservation and aggrandizement. And now, without visiting the *American* dominions of other *European* princes, coming *per saltum* to *British America*, whose present and future state so nearly concerns the common-weal, it presents a most unpleasing scene. It was lately the seat of a sharp and cruel war, waged by those enemies who never give us farther rest than their inability inforces, with intent to wrest from us one of the chief sources of our commercial and naval empire, during the course whereof several colonies raised a larger proportion of men than any other part of his majesty's dominions; and since, while labouring to restore the broken state of their affairs, and to prosecute that trade which is so necessary to the commerce of this kindom, through the sudden change of *British* policy, and a strange series of errors and events, the whole are now plunged into a state of distress, difficulty and danger, from which it is desirable in so many respects to deliver them as soon as possible, and to shew their true political foundation, in order to their complete and perpetual union with this kingdom, for the common good. The establishment, corroboration and preservation of this union, considered in its most perfect degree, will appear, I presume, to every impartial and considerate person worthy of the greatest attention. The distant situation of the colonies, with their cantonment and distinct civil administrations, though placed under the wise and provident care which presides over all parts of the state, raises insensibly in the minds of many worthy persons partial notions discordant with this union; but its greatest enemy, I conceive, is prejudice, that malady of the mind, and powerful director of its motions; and in this case, as well as in that of superstition, unfortunately wise men frequently follow fools, and our insular and continental prejudices are become so numerous and violent, that I who am so feeble an advocate for the principles of truth, universal justice, and public welfare, the sole proper and firm foundation, in my poor opinion, of that lasting and profitable union that is so much to be desired by all good citizens, dare not enter the list against so formidable an enemy; and therefore adhering to my principle of peace, and that uniting, conciliating
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and strengthening system which I have ever held, after observing that common justice is the common debt due to and from all persons and societies, and the common cause of all honest men, and that nothing can be more unreasonable than for a man to make one law in his mind for himself, and another for other persons, I shall desire the favour of him who on reading what has been said respecting this perfect union shall perceive the least prejudice to arise in his mind against it, that he will be pleased calmly to consider this divine precept of the Saviour of the world, “all things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets,” And if this shall not suffice to efface the impressions of prejudice, that he will lay aside this little essay until he come to such a temper of mind that he shall be willing to do as he would be done unto; in the mean time, accompanied by the favour of the candid reader, I shall proceed to observe,

Mat. vii.
12.

I. That his majestys regal authority extends to all persons, and over all parts of the public territory—that every subject by the law and the duties of his birth is obliged to be faithful, and bear true allegiance to the king—That allegiance and protection being correlatives, every subject is entitled to protection.

II. That the nature of human government, in order to its completion, of necessity requires in every state for its welfare and preservation the existence and occasional exercise of a supreme legislative jurisdiction, over all and singular the parts, persons natural corporate or compound, causes, matters and things whatsoever—That by the *British* constitution this supreme jurisdiction is vested in the *British* parliament—That the entire collective dominion, state, or chief body politic, composed of all its members, admits but of one supreme direction, equals have no power over equals, and two or more supreme jurisdictions cannot be erected without forming two or more different states; and it is evident this division ministers to destruction. The colonies from their situation, nature, and necessary political existence possess subordinate powers of legislation, but the sole *summum imperium* of the *British* parliament remains firm, immutable and universal—That the kings just prerogative was ever parcel of the law of the land; and, to use the words of lord *Bacon*, who, with

with other able lawyers and states men, was much consulted and concerned in the settlement of some of the colonies. “The kings prerogative and the law are not two things”—“There is not in the body of man one law of the head and another of the body; but all is one entire law.” And it is certain that none of his majestys predecessors had it in their power by any act made *de industria* in any manner whatever to diminish the jurisdiction of parliament, or to divide that body politic of which they were the head, thereby making a change nearly affecting the royal prerogative together with the whole common-wealth. *Nil dat quod non habet* is a maxim of law, philosophy and common sense, and no colonic or other politic body can by force of any charter claim any power, privilege or jurisdiction exempt from parliamentary cognizance, the king having no authority to raise or create the same. Every charter is the creature of the law, and necessarily subject to the law and the law-makers; and we have too much reason to remember the ancient and just observation, *Ordo confunditur si unicuique jurisdictio non servetur*.

III. That the nature and intent of parliamentary jurisdiction, I presume, are to declare and enact what is right, equal and just, giving to the common-wealth and its various parts their due. Ancient authors declare verity and justice to be the proper foundation of parliamentary proceedings. *Jurisdictio est potestas de publico, introducta cum necessitate juris dicendi* [b]; and lord Coke says *jurisdictio* is derived of *jus & ditio*, i. *potestas juris*. And although through prejudice, passion or other infirmities men may not in particular cases, especially when their minds are moved by self-interest, discern and distinguish between truth and error, justice and injustice; yet truth, justice and equity are in their nature immutable, and no more subject to annihilation, inversion, or variation, than any geometrical proposition—That no prince, potentate, state or order of men can by any means whatever acquire a right of doing what is wrong. An author whose exquisite learning, knowledge and judgment have done so great honour to human nature, as well as to this kingdom, Dr. Cudworth, hath clearly shewn that even in positive laws and commands it is

[b] See the proem to Cokes 4th Instit.

not meer will that obligeth, but the nature of good and evil, just and unjust, really existing. In the course of his reasoning he writes thus, "every thing is what it is by nature, and not by will; for though it will be objected here that when God or civil powers command a thing to be done that was not before *obligatory or unlawful*, the thing willed or commanded doth forthwith become *obligatory*, that which ought to be done by creatures and subjects respectively; in which the nature of moral good or evil is commonly conceived to consist; and therefore if all good and evil, just and unjust be not the creatures of meer will (as many assert) yet at least *positive things* must needs owe all their morality, their good and evil to meer will without nature; yet notwithstanding, if we well consider it, we shall find that even in positive commands themselves meer will doth not make the thing commanded just or obligatory, or beget and create any obligation to obedience; but that it is natural justice or equity which gives to one the right or authority of commanding, and begets in another duty and obligation to obedience [i]."—According to Dr. *Cumberland's* excellent rule, approved, or rather applauded by the most eminent foreign authors, "Nothing can be deemed the law of nature in which all men cannot agree"; and the most able jurists have united in declaring that positive social laws should enforce the natural, or conform to them as far as possible. Mr. *Locke* says, "The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, *legislators* as well as others, The rules that they make for other mens actions must, as well as their own and other mens actions, be conformable to the law of nature, *i. e.* to the will of God, of which that is a declaration." And that "the first and fundamental positive law of all common-wealths is the establishing the legislative power, as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will

[i] Treatise concerning internal and imutable Morality, p. 17, 18.

“ consist with the public good) of every person in it [k].”—That good and perfect laws are the dictates of perfect reason relative to their subject known in all its parts; and positive laws, so far as they partake of prejudice, passion, improvidence, or other infirmity, or are formed on the partial knowledge of their respective subjects, are imperfect; the wisest legislators cannot judge aright, or rather not at all, of that which was never exposed to their judgment, and a law made upon the best consideration of some parts only of its subject matter, with an exclusion or inscience of other proper and material or essential parts, from the nature of legislation, and its objects, is apparently an improper or imperfect law. Considered with respect to the case stated and supposed, if the same had subsisted, it might have been just and proper; but the true and real case, composed of all its parts, materially differing from it, required either a different law, or none at all; and consequently the law thus made through error, according to the immutable principles of truth, justice, and legislation, I presume, is to be discontinued, the continuance of an error when known differing widely from its first commission when unknown; nevertheless it is the duty of the parties concerned to obey such erroneous or improper law as far as possible, until its review and repeal by the legislators shall take place, to whose wise, equal and just consideration and decision all reasons respecting its real or supposed errors, improprieties or defects, must be properly and entirely submitted.—That the ablest politicians have held it difficult for one country to make laws for another; and the greater their distance the greater their difficulty. The *Roman* councils were frequently embarrassed by this business, although their political wisdom so far exceeded in many respects that of other nations. The nature of the *British* empire, divided by the situation of its several parts, with the necessary unity of the supreme power over the whole, is inevitably accompanied with this difficulty. All the freeholders in *England* worthy of notice in this behalf are represented in parliament by persons chosen by them for that purpose, who, with the representatives of the cities and boroughs, and the representatives of

[k] Treatise of Government, Chap. 11th.

Scotland, form the house of commons, or an order of men well acquainted with the nature, condition and interest of the whole kingdom, and its respective parts; and yet when interesting laws are depending how oft do we see special communications take place between these representatives and their constituents, for the sake of better information; and notwithstanding the use of these, the best means of knowledge, an improper or imperfect law has been some times made: and when the principal or dominant part of a state makes a law relative to its distant parts it seems desirable to use every mean of investigating the truth respecting all the subject matters of it, so that the numerous additional difficulties unavoidably arising from distance may, as far as possible, be countervailed by the most diligent comprehensive enquiry and thorough examination, without which provident care laws made for the advancement of commerce may cause its diminution, and other laws may operate contrary to the intent of the legislators; and it is needless to say that when such dominant part makes a law for the distant parts in ease of itself the most liberal just and equitable consideration becomes more especially requisite, in order to countervail the natural dictates of self interest. With respect to the political state of our colonies there seems to be no bounds to the errors of minor politicians and pamphleteers, which, with other errors relating to their commercial state, joining and increasing the prejudices and tempestuous passions of numbers have caused so great violence and grievous outrages. In truth many of *Britannias* sons seem to have lost the proper sense of their duty to their mother and to each other, brother would bastardize brother, some would unnaturalize others, and others would unnaturalize themselves, without duly considering their own conduct in its nature and consequences. To check these mischiefs, and restore all things into order, the chief strength and safety, as well as beauty, of the civil state, I know no means so useful as having recourse to truth, the common friend of all honest men, and of all just measures; and therefore returning to my former course of proceeding I shall farther observe,

IV. That the *English* colonies are the legitimate off-spring, image and part of the common-wealth, and well entitled to the rights, liberties, and benefits of it, or, in other words, they have good title to *jus publi-*

cum and *jus privatum*, and to both *optimo jure*, the enlargement of the empire, in pursuance of proper regal authority, at the toil and peril, and the expense of the blood and treasure of the planters—That these rights entitle them of course to every proper and practicable mean of preserving them, rights without the means of their preservation being defeasible and illusory—That by the first leading grant made for the discovery and settlement of the *English* part of *America* to Sir *Humphrey Gilbert* by queen *Elizabeth*, on the 21st. day of June, in the 20th. year of her reign, after directing that the same should be made by her *English* and *Irish* subjects; for uniting in more perfect league and amity such countries “with her realms of *England* and *Ireland* and for the better encouragement of men to this enterprize;” she granted and declared that all such countries so to be possessed and inhabited should thenceforth be of the allegiance of her, her heirs and successors, and did thereby grant to Sir *Humphrey*, his heirs and assigns, and to all other persons of her allegiance, who should, in pursuance of the directions therein contained, proceed and inhabit within any such countries, that they and their heirs “should have and enjoy all the privileges of free denizens and persons “native of *England*, and within her allegiance, in such like ample manner “and form as if they were born and personally resiaunte within the “said realm of *England*.”—That the grant made to Sir *Walter Raleigh*, under which the first settlement was made in *Virginia*, was in these respects similar to this; and it is altogether unnecessary, I apprehend, to cite the several succeeding royal grants which were grafted upon these, and co-operated with them in establishing the *English* empire in *America*; every subsequent grant being made by the king of *England* to his subjects, whether to an individual or to numbers, to persons natural or politic, as well those which have lost their force as those which continue in force, in their nature and tenor supposing, confirming, and establishing this empire, and strengthening the connection of these distant countries, and all their inhabitants, with the realm of *England*, the king holding the whole under the same allegiance—That by the stat. 15 *Car. II.* cap. vii. which provided that the *European* commodities imported into the plantations should be shipped in *England*, whose policy and provision I have heretofore laboured to preserve, it is thus recited and declared, “in regard
“ his

“ his majesties plantations beyond the seas are inhabited and peopled by his
 “ subjects of this his kingdom of *England*: for the maintaining a greater
 “ correspondence and kindness between them, and keeping them in a
 “ firmer dependence upon it, and rendring them yet more beneficial and
 “ advantageous unto it, in the further employment and increase of
 “ *English* shipping and seamen, vent of *English* woollen and other manu-
 “ factures and commodities, rendring the navigation to and from the
 “ same more safe and cheap, and making this kingdom a staple not
 “ only of the commodities of those plantations, but also of the commodi-
 “ ties of other countries and places, for the supplying of them; and it
 “ being the usage of other nations to keep their plantation trade to
 “ themselves: Be it enacted” &c. Here we have an exprefs declaration
 made by parliament, *per verba de præsenti*; that his majestys plantations
 beyond the seas were inhabited and peopled by his subjects of this his
 kingdom of *England*, whose political state hath questionless ever since
 continued the same—That by the stat. 13 *Geo.* II. cap. vii. it was enacted
 that from and after the 1st. day of June, in the year 1740, all persons
 born out of the ligeance of the king, his heirs and successors, who had
 inhabited, or should inhabit, for the space of seven years, or more in any
 of his majestys colonies in *America*, and should take the oaths, and make
 the declarations therein directed, “ should be deemed, adjudged, and
 “ taken to be his majesty’s natural born subjects of this kingdom, to all
 “ intents, constructions and purposes, as if they and every of them had
 “ been or were born within this kingdom.”—That it is impossible, I
 conceive, for any prince or state intending to enlarge their public territory
 by the acquisition of any distant lands or countries, to take more proper
 and efficacious means for making the same parcel of their empire than
 have from the foundation of the colonies been taken by the kings and
 parliaments of *England* to unite them with their mother country, and
 form one empire of the whole; so that considering their nature, notoriety
 and importance, it is matter of great surprize as well as concern, to see
 such manifold pertinacious mistakes made in this kingdom and the colonies
 touching their political nature by numberless writers and other persons,
 who being strangers to their true foundation, form erroneous and inju-
 rious hypotheses concerning them.

V. With respect to the question when in a state wherein the laws are made by the prince, the nobles, and persons chosen by the people, the greater part live in one quarter of the world, and the lesser part in another; and the greater part chuse those persons who make part of the legislative, and who are by the *English* lawyers and other authors, called the representatives, attornies or advocates of their constituents, and in foreign states ambassadours, or by other names denoting the persons elected and deputed by many others, to represent and act for them, the lesser part having no vote or voice in this choice, whether the persons thus chosen by the greater part can be truly, justly and properly said to be the representatives of the lesser part; in which case I desire leave to hold the negative, and pray the favour of him who is enclined to the affirmative, that he will consider himself as one of the lesser part, and then declare his approbation or disapprobation of this representation; for in truth it seems to me that impartial consideration might suffice to resolve this question; nevertheless I shall endeavour to illucidate this particular. It is said that the *English* colonies, which are the lesser part of the state, though not actually, are virtually represented in parliament by the members chosen by the greater part. The mischiefs, divisions, difficulties and dangers which attend the state, whose primary source apparently was the conduct of ministers unprovided with proper and necessary knowledge, with an exclusion of wiser counsels, and better information, have several times brought to my mind *Pandora's* box, out of which the maladies and calamities of mankind took their flight. And truth being an immutable entity and intelligibility, and error a meer phantasy or figment of the imagination, this notion of virtual representation being as incomprehensible by my mental faculties as transubstantiation, or the popes representation of the Deity, hath brought to my mind the opinion of those among the ancients who held that there was no certainty in the human intellect, or its objects: but on due consideration, I am fully convinced, to use the words of Dr. *Cudworth*, that "Truth is the most unbending and uncompliant, the most necessary, firm, immutable, and adamantine thing in the world;" and in case this notion of virtual representation be true, it is capable of being so clearly and distinctly represented and evinced as to force the assent of the equal
and

and intelligent mind; wherefore I hope that its advocates will be pleased to explain, support and complete their new system of representation, observing that equal rights require equal means of preservation. That the inequalities in the representation of one country are no reason for rejecting the representation of another. That according to the excellent rule of *Placcius*, and the sentiments of Mr. *Locke* in this particular, we are not to reason from defect to defect, thereby making the political system still more and more defective; but to keep the right line or state of perfection in view, making our approaches towards it, and that one plain simple principle of universal justice and public welfare is in my poor opinion, worth a thousand such refinements or temporary expedients—That Mr. justice *Doddridge*, that learned antiquary and able lawyer, supposes that the opinions of *Polydore Virgil* and *Paladine* are reconcileable with the “manuscript of *Canterbury*, that the first parliament wherein the commons were called, as well as the peers and nobles, was 16 *H. I.*; for it is true that after the conquest until this time the commons were not called; and so at this time they will have it first called by the name of a parliament.” This learned judge calls *Edward I.* the founder of our civil state, and lord chief justice *Hale* says that he “is well stiled our *English Justinian*; for in his time the law *quasi per saltum* obtained a very great perfection.” And the following record will manifest his sense of representation.

Claus de Anno Regni regis Edwardi Viceffimo tertio.

Parliamen-
to tenendo.

“Rex venerabili in Christo patri
“R. eadem gratia Cantuar archie-
“piscopo totius Angliæ primati Sa-
“lutem. Sicut lex justissima pro-
“vida circumspectione sacrarum
“principium stabilita hortatur, &
“statuit, UT QUOD OMNES TAN-
“GIT AB OMNIBUS APPROBETUR
“sic et innuit evidenter ut com-
“munibus periculis per remedia

The king to the venerable father
in Christ R. by the same grace
archbishop of *Cant.* primate of all
England, greeting. As the most
just law by provident circumspec-
tion of sacred princes established
adviseeth and hath appointed, THAT
WHAT TOUCHETH ALL MEN BE
APPROVED OF ALL, so it likewise
evidently intimateth that common

“provisa

“provisa communiter obvietur sane
 “satis nostris et jam est ut credi-
 “mus p’ universa mundi climata
 “divulgatum qualiter rex Francie
 “de terra nostra Vasconie nos cau-
 “teloſe decepit eum nobis nequi-
 “ter detinendo nunc vero predictis
 “fraude & nequicia non contentus
 “ad expugnationem regni nostri
 “classe maxima & bellatorum co-
 “pioſa multitudine congregatis cum
 “quibus regnum nostrum & regni
 “ejuſdem incolas hoſtiliter jam in-
 “vaſit linguam Anglicam ſi con-
 “cepte iniquitatis propoſito de
 “teſtabili poteſtas correfpondeat
 “quod Deus avertat omnino de
 “terra delere proponat Quia igitur
 “previſa jacula minus ledunt et res
 “veſtra maxima ſicut ceterorum
 “regni ejuſdem concinium agitur
 “in hac parte vobis mandamus in
 “fide & dilectioni quibus nobis
 “tenemini firmiter injungentes
 “quod die dominica proxime poſt
 “feſtum Sancti Martini in hyeme
 “proxim’ futur’ apud Weſtmo-
 “naſterum perſonalit’ interſitis pre-
 “munientes priorem & capitulum
 “eccleſie veſtre archidiaconos to-
 “tumque clerum veſtre dioceſis
 “Facientes quod iidem prior & ar-
 “chidiaconi in propriis perſonis
 “ſuis & dictum capitulum per
 “unum idemque cleros per duos

danger be obviated by remedies
 provided with common conſent.
 Truly we have as we think already
 ſufficiently divulged through all
 climates of the world how the king
 of *France* hath craftily deceived us
 touching our territory of *Gascoine*,
 wickedly detaining it from us, and
 now, not content with the fraud
 and wickedneſs aforeſaid, hath pre-
 pared a very great fleet, with a pow-
 erful army for the aſſaulting our
 kingdom, with which he hath al-
 ready hoſtilely invaded our king-
 dom, and the inhabitants of the ſaid
 kingdom, the *Engliſh* tongue, if
 power correfpond with the deteſt-
 able purpoſe of the conceived ini-
 quity, which God avert, he pur-
 poſeth entirely to abolish. Be-
 cauſe therefore darts foreſeen hurt leſs, and
 your greateſt intereſt, with that of
 your fellow citizens of the ſaid
 kingdom is herein concerned, We
 charge you in the faith and love by
 which ye are held unto Us, ſtrictly
 injoining that on the Lords day
 next after the feaſt of St. *Martin*,
 in the winter next enſuing, ye be
 perſonally preſent at *Weſtminſter*,
 forewarning the prior and chapter
 of your church, the archdeacons,
 and all the clergy of your dioceſe,
 cauſing that the ſaid prior and arch-
 deacons in their own perſons, and
 “procuratores

“procuratores idoneos plenam &
 “sufficientem potestatem ab ipsis
 “capitulo & cleris habentes una
 “vobiscum interfint modis omni-
 “bus tunc ibidem ad tractandum
 “ordinandum & faciendum nobis-
 “cum & cum ceteris prelatiis &
 “proceribus et aliis incolis regni
 “nostri qualiter sic hujusmodi peri-
 “culis & ex cogitatis maliciis ob-
 “viandum. Teste rege apud Wen-
 “geham tricesimo die Septem-
 “bris.”

the said chapter by one, and also the
 clergy by two fit proctors having
 full and sufficient power from them
 the chapter and clergy, be present,
 together with you, by all ways then
 and there to consult, ordain, and
 take such effectual measures, with
 us, and with the other prelates, and
 nobles and other inhabitants of our
 kingdom, as will obviate such dan-
 gers and malicious devices. Wit-
 ness the king at *Wengeham*, the
 thirty-first day of September.

That the right of representation in parliament hath in other cases
 been allowed, in consequence of the enlargement of the public territory.
Wales was conquered by *Edward I.* by the stat. of *Rutland* it was an-
 nexed to *England*; but their close, firm and perfect union was made by
 the stat. 27. *Hen. VIII.* cap. 25. wherein it is recited that “Albeit
 “the dominion, principality, and country of *Wales* justly and right-
 “eously was, and ever had been incorporated, annexed, united, and sub-
 “ject to and under the *Imperial* crown of this realm, as a very member
 “and joint of the same;” and yet, from certain causes therein men-
 tioned, “some rude and ignorant people had made distinction and
 “diversity between the kings subjects of this realm, and his subjects
 “of the said dominion and principality of *Wales*, whereby great
 “discord, variance, debate, division, murmur, and sedition had grown
 “between his said subjects;” wherefore, among other reasons, “to
 “bring his said subjects of this his realm, and of his said dominion of
 “*Wales* to an amicable concord and unity,” among other things, pro-
 vision was made for its representation in parliament. And the first
English colony having been planted at *Calais*, the same parliament, in the
 same session, provided for its representation in parliament also. The
 first writ thereupon issued, that I have seen, bears date the 2d day of
 August, in the first year of the reign of *Edward VI.* whereby the king
 commanded

12 Edw. I.]

commanded the mayor and burgesſes to cauſe to be elected a diſcreet inhabitant of the ſaid borough, to be a burgeſs for his parliament for the ſame, according to the form of an act made by the parliament held the 27th *Hen. VIII.* aforementioned; “ ſo that the ſaid burgeſs ſhould have
 “ full and ſufficient power for himſelf and the ſaid community to do
 “ and conſent to what ſhould be ordained by the common council of his
 “ kingdom.”

VI. That where religion, liberty, order, and good government are, there will be numbers, plenty, ſtrength and ſafety, with a proper union of all the parts for the good of the whole—That as the declenſion and diſſolution of ſo many different ſtates irrefiſtably prove the difficulty of perpetual preſervation, ſo it is likewise certain that commercial and naval empires are unavoidably attended with ſpecial difficulties reſpecting their duration and flouriſhing condition. For proof of this we need not have recourſe to the ancients, *Europe* having within theſe three hundred years given us ſo many examples, that it would be tedious as well as unneceſſary and unpleaſant to compare their preſent with their former ſtate.—That commerce when ſhe takes her flight leaves a country in a worſe condition than ſhe found it, and knowing no return, the inhabitants may in vain lament that loſs which their improvidence or unkind uſage cauſed.—That although ſtrength be ever preferable to wealth, yet when the ſtate is greatly infected by luxury, whoſe natural offſpring are diſſipation, folly, fraud, diſtreſs, and danger, with mental enervation, which united, with or without concomitant cauſes, have ſo often occaſioned diſſolution or deſtruction, greater attention is paid to thoſe trades and traders which miniſter to luxury, and weaken the ſtate, than to thoſe which ſtrengthen it. Of this we have given the world a memorable example. What a ſtir do we from time to time make about the *East India* trade, not to mention others, which never raiſed the ſeamen it deſtroys, and promotes luxury ſo many different ways, while we pay ſuch a diſproportionate regard to the trade with and of our colonies, which, including the fisheries, to uſe the naval expreſſion of an intelligent friend, is the main ſtay of the *British* commerce; ſo that although trade be in its nature ſo intricate and delicate that human wiſdom, even after the ſtricteſt enquiry into facts, is frequently unequal to the difficulty
 of

of forming salutary regulations for it, instead of close attention, examination and comprehension, we are sometimes inclined, even on great occasions, to confide in the specious and erroneous representation of others, who make a parade of their knowledge in those subjects to several of whose essential parts they are utter strangers—That our foreign trade collectively considered hath declined apace, and that depending on the changeable minds and circumstances of other princes and states, they are in effect contending various ways for its farther diminution, our colony trade having in the mean time so far encreased as to have exceeded all these diminutions, and while prosecuting to the utmost by the spirit of the colonists, who employed herein all their stock and domestic credit, with a large credit given by the *British* merchants, and when labouring under various difficulties, a project was formed of raising a revenue upon it, with the traders and other inhabitants—That to carry on a general trade a proportionate stock of money is requisite; and when this project was formed there was in the continent colonies scarcely money sufficient, even with the aid of the paper currency used by several, to carry on their trade—That the money proposed to be raised by way of revenue being to be collected from the old and principal trading colonies, and wholly, or chiefly spent upon new and distant acquisitions, the execution of this project must of necessity diminish and embarrass their trade, to the prejudice of the trade of this kingdom, all the real money then remaining in the continent colonies probably amounting to about an eighth or tenth part of what was due from the traders there to the *British* merchants, and which being suffered to remain there as the necessary means of driving about the wheels of trade would assist the traders in the discharge of their debts, and in the continuance of that large trade which they have so long carried on for the common benefit—That in a country dependant on commerce the primary object of political consideration relative to it is presumed to be the increase and exports of its manufactures, the benefits whereof are diffused through all parts; and therefore raising a revenue upon their diminution is in effect making a dangerous stroke at the root of that which ought to be cherished, or proceeding like him who cut the bough whereon he stood—That the colonies, supposing the annual exports of *British* commodi-

ties to them to amount to the value of two millions sterling, have thereby probably paid yearly one million of the *British* taxes, or considerably more. To illustrate this particular, it is to be observed that every manufacturer charges all the taxes paid by him upon his manufacture. A clothier for instance who employs a thousand persons, whose taxes, together with those of his own family, amount to £ 10000, he being reimbursed by the sale of his cloth, each piece bears of course its proportion of the whole, and is paid finally by the wearer. The amount of the public demands are by the intelligent variously estimated. An old friend, who in many respects is extremely acute in his discernment touching the interior state of the kingdom, as well as exact in his calculations, and who by the way had hard measure in one of our late ministerial revolutions, some time before the commencement of the last war mentioned to me with approbation an estimate made with diligence by other judicious persons, whereby it was supposed that the same amounted to fourteen shillings in the pound ; so that according to this calculate the accumulative part of the price of manufactures in proportion to the natural is as fourteen to six. Being no competent judge of all the particulars of this affair, I leave them to those who are ; but taking the lowest estimates of the amount of the *British* exports to the colonies, and of the public charges, through various circulations resting on them, and finally on their consumers, and considering the same together with the entire commercial and pecuniary state of the colonies, it clearly appears to me that this revenue-project, if peaceably carried into execution, as far as the nature of things would permit, would by its natural operations certainly have caused so great a diminution in the exports of *British* commodities that for every penny collected in the colonies by way of revenue this kingdom would very soon have lost six-pence, and probably in a short time considerably more. The history of commerce fully proves that it cannot be preserved without consulting its nature, with all its connections, and trade will sometimes, like water, only bear its own weight, and the trade of the colonies having been strained to the utmost, and its products collected from all parts constantly leaving the traders there immensely in debt to the *British* merchants, its continuance was incompatible with new burthens, and the application of that money

money to other purposes which was necessary to carry it on—that the most judicious persons have in time past thought it adviseable by every proper method to encrease the trade of the colonies, keeping it under due regulations, and to assist in providing for them such profitable employment as might enable them to pay for large quantities of *British* manufactures; whereas this new project hath a direct tendency to drive the inhabitants out of trade, and from the sea coast into the inland parts of the country, where every man living upon his freehold will eat his own mutton, and cloath himself with the skin and the wool.—That the colonies, like this and other countries, animated by the spirit of trade, would as they encreased their ability, as they have in times past, continue to encrease their trade, and distressing this trade with the traders is starving the hen that lays the golden egg.—That the cherishing and regulating is so far preferable to the impoverishing system, that there is not a political truth, even that which declares honesty to be the best policy, that appears more clear to me than this, That the flourishing trade and condition of the colonies will ever best secure and augment their commercial and beneficial connection with this kingdom. By their nature and original settlement they are unquestionably part of the family of *England*, and their comfortable condition will not only enable them to prosecute trade in time of peace, but invigorate their defence in time of war, of which it is not improbable they may again be the seat. There is no end of vulgar errors relative to this particular; our enemies attack our colonies as essential parts of that commercial and naval empire which they would reduce; and if, instead of promoting and strengthening the most desirable union, our errors and theirs, with consequent divisions, should make them more vulnerable; they will of course become the object of the enemies policy and force; and, lamenting our divisions considered in every light, I am sorry that some of our politicians have not been enclined to such treatment of them, that, to use the words of a worthy patriot, spoken to the king on the throne, it might be their inclination as well as duty to be obedient to his majesty and the laws. On the other hand it behoves the colonies to consider that their honour and their interest, their safety and happiness consist in their continuing proper and useful members of the

common-wealth, to take care that the spirit of liberty be accompanied with a due sense of government; to maintain their rights and interests in proper manner, and to pay the same reverence to the king and the parliament as if placed nearer to them, remembering what was said by an author whose credit they will not question [1], "this is not the liberty which we can hope, that no grievance ever should arise in the common-wealth; that let no man in this world expect; but when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained, that wise men look for." And it may not be improper for others as well as the colonists on this occasion to recollect not only the saying of *Vopiscus*, but likewise the words of the judicious Dr. *Fleetwood*. "The present designs of men have, it may be, no eye or tendency to such and such a consequence; but, however, men must look to it; for when we are once out of the right way, every step we take leads us but into farther wanderings; and we know not whither we are going."

VII. With respect to the reasons relative to the repeal of the stamp-act, extraneous to the real merits of the case, I shall not presume to express my own sentiments; but, under favour, shall insert the words of Mr. *Milton*, in his *Areopagitica*, addressed to the parliament of *England*, wherein, after taking notice that there were abundant examples of private persons giving their counsel by speech or writing to sundry free states, in those ages to whose polite wisdom and letters we owe that we are not *Goths* and *Jutlanders*, he wrote thus; "and how far you excel them, be assured, Lords and Commons. there can no greater testimony appear, than when your prudent spirit acknowledges and obeys the voice of reason, from what quarter soever it be heard speaking; and renders ye as willing to repeal any act of your own setting forth, as any set forth by your predecessors." And shall observe that in several countries ruled by absolute princes an appeal lies from the decree of the prince, that is, *à se male informato, ad se bene informatum*; and I have ever understood that the honour of the prince was more

[1] Mr. *Milton*.

concerned in giving a just decree upon the appeal and review of the case, than in pronouncing his first decree.

As to those sons of violence who, without taking notice of others, have to the dishonour of that colony whose merits with respect to its mother country, all things considered, exceed those of any one of an hundred *Roman* colonies, not to name a greater number, have risen up in its capital, and, under the pretence of reformation, have committed such outrages, I exhort every man of them, for his own sake, as well as that of others, that leaving the care of the common rights to those to whom it belongs, and renouncing his offences, he continue to be quiet, and by his peaceable and proper behaviour prepare himself to partake of the clemency of a gracious prince who delights in the exercise of his mercy. And, in order to mollify the minds of those who seem as great strangers to humanity as they are to sound policy, I shall, in the words of *Lipsius*, set forth the mild conduct of an excellent prince.

“ Shall I omit thee *Alphonfus*? who being all goodness and beneficence
 “ hast represented to us *Titus*, but with long continuance. Thou besieging *Caieta*, which had obstinately rebelled against thee, the besieged
 “ appeared to be pressed with want of provisions, which themselves declared by putting forth old men, boys, women, and all the useless
 “ multitude. In council it was advised that they should be rejected and
 “ driven back, for that so the city would soon surrender, he through commiseration chose rather to dismiss them, and continue the siege: but,
 “ upon his not taking the place, some dared to object, that if he had not let
 “ them go the city would have been his; he nobly answered. *But the safety of so many persons, is more to me than an hundred Caietas.* However he
 “ was not long without it, for the citizens, admonished by such extraordinary virtue, and repenting, voluntarily surrendered themselves.
 “ His conduct was similar towards *Anthony Caldora*, the most powerful
 “ man of the *Neapolitan* kingdom, and his obstinate enemy, whom having at length in a great battle subdued, and taken, when all persuaded
 “ to put to death so troublesome a man, and who was ever at enmity
 “ with the *Arragonians*, he alone withstood, and not only pardoned, but
 “ restored his estate to him, and gave to his wife all his elegant and
 “ valuable furniture and other moveables, which he had in his hands,

“ reserving to himself only one crystal cup. Such were his actions,
 “ with which his expressions accorded. Being asked why he was mild
 “ towards all, even the wicked. *Because*, said he, *justice conciliateth the*
 “ *good, clemency the bad.* Again, when his ministers complained of his
 “ too great lenity, as not becoming a prince. *What*, said he, *would you*
 “ *have bears and lions to reign? For clemency is the peculiar of men,*
 “ *cruelty of wild beasts.* He said what was true. By how much the
 “ greater, and more, as I may say, of a man any one is, so much the
 “ more is he inclined to this virtue, which is therefore termed huma-
 “ nity.”

Scotland in consequence of two rebellions raised there, in order to destroy, or drive away the present royal family, happily placed on the throne for the preservation of our common liberties, hath by the wisdom and equity of the *British* parliament been made more free, whereas the end and intention of every action being to be considered, in justice to the colonies, whose distance lays them under manifold difficulties, it may be said, if I am not wholly mistaken, that their intention is to defend their rights according to their sense of them, and how far that is erroneous, or its defence improper, is not my province to declare. As to these politicians who seem to delight in blood, and are so solicitous to introduce a social war, whereby after so narrowly escaping the sword of our enemies we should employ our own swords in destroying ourselves, every stab destroying a subject, and diminishing that commerce which gives bread to so many others, their policy, instead of being the result of any wise consideration suitable to the occasion, seems to be the dictates of their prejudice, their passions, or something worse. If these advocates for destruction had been pleased fully to explain their own proposition, considered with respect to its nature, operations, and conclusion, without which all proposals are vain, its impropriety and dangers, I presume, would evidently appear.

Rome when in her flourishing estate was brought to the brink of ruin by the social war, occasioned by her refusal to communicate the *Roman* right. After suffering so much by her various errors and corruptions she granted it to all the nations of which her empire was composed, and
 for

for this grant her praises in verse and prose will endure to all ages. *Clau-*
dian says,

*Hæc est in gremium victos quæ sola recepit,
Humanumque genus communi nomine fovit,
Matris, non dominæ, ritu: civesque vocavit
Quos domuit, nexuque pio longinqua revinxit.*

And *Rutilius*,

*Fecisti patriam diversis gentibus unam,
Profuit injustis te dominante capi.
Dumque offers victis proprii consortia juris,
URBEM fecisti quod prius ORBIS erat.*

Upon taking a view of all parts of the public territory, and considering them in their nature, situation and mutual relations, with the relation of the whole to other states, including our debts, which all the money in *Europe* probably could not discharge, whereof the principal or interest due to foreigners is to be paid by the balance of our trade, and how far our credit is exhausted, together with the ordinary course of human affairs respecting war and peace, it does not, I presume, require the foresight of *Themistocles* to discern that our future welfare and safety require the present exercise of great wisdom; and that the whole having one common interest to support against our competitors, adversaries and enemies, and all being members of the same body, laying aside our prejudices, divisions and animosities, we should unite our endeavours for the advancement of the common good, ever remembering that justice is an architectonic virtue, and what we learn from *Æsop*, and that wise and great emperour and philosopher *Antoninus*, that the bundle of sticks given by the father to his sons while united is not to be broken, and that what is not good for the hive is not good for the bee; and moreover what was said to the Lords and Commons in Parliament, *Eritis insuperabiles, si fueritis inseparabiles. Explosum est illud* ^{4 Hen. VI.} *diverbiū: Divide & impera; cū radix & vertex imperii in obedientium consensu rata sint.*

Having

Having for the advancement of truth, liberty, universal justice, and the public welfare, subjects worthy of a much abler pen, written with that freedom which becomes the member of a free state, I shall now cheerfully submit the whole to the candour and correction of the judicious and impartial, and to the pleasure of those who delight in censure. With respect to the former I shall ever say blessed be the amending hand, and of the latter I pray this favour, that they will for the common good be pleased to write better on these important subjects.

F I N I S.

E R R A T A.

p. 1.

1 4 dele the comma after *affairs*.17 16 read, *judicially*.

42 dele the inverted commas from the 9th to the 14th line.

49 7 read, *in forming*.54 21 read, *commonly*.58 21 read, *freehold*.97 22 read, *attaching*.99 23 read, *commission*.

From p. 104, to 113, read, 105, &c.

117, last line but two, read, *on*.119 32 read, *feruntur*.143 last line, read *immutable*.

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Bollan, William

The Freedom Of Speech and Writing Upon Public Affairs Considered; With An Historical View Of The Roman Imperial Laws against Libels, as Violations of Majesty, or lesser Offences. The Nature and Use of Torture among the Romans and modern Europeans

London 1766

4 Brit. 144-2#Beibd.1

urn:nbn:de:bvb:12-bsb10225767-8